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No. 88-

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE BARBIZON CORPORATION,
Petitioner,

vs.

ILGWU NATIONAL RETIREMENT FUND,
SOL C. CHAIKIN, and
JOSEPH MOORE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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39 pp

QUESTIONS PRESENTED

1. Whether a court may, through summary judgment, make substantive changes in statutory language under ERISA §4217, thereby unlawfully imposing retroactive liability on an employer and effecting changes in other parts of the statute.

2. Whether a court may decide on a motion for summary judgment that there was no decline in contributory operations at a facility under ERISA §4217(a)(2) when the stipulated facts show an 81% decline in contributions to the Fund.

3. Whether a court may refuse to find a facility closing under ERISA §4217(a)(2) when the stipulated facts show that the employer closed its plant, terminated all employees, sold the property and most of the equipment, lost all of its productive capacity, and thereafter obtained needed goods from non-union sources.

4. Whether a court may decide on a motion for summary judgment that an obligation to contribute for work performed under a collective bargaining agreement did not cease where the stipulated facts show that the applicable plant closing agreement and master agreement expired prior to the effective date of MPPAA and that a new master agreement covering other operations was not agreed upon until a year later.

RULE 28.1 LIST

Pursuant to Supreme Court Rule 28.1, Petitioner, The Barbizon Corporation, states that it has no parent companies, subsidiaries (other than wholly owned subsidiaries), or affiliates.

LIST OF PARTIES

The parties to the proceeding below were The Barbizon Corporation (Plaintiff-Appellant) and the ILGWU National Retirement Fund, Sol C. Chaikin, and Joseph Moore (Defendants-Appellees).

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Pursuant to Supreme Court Rule 20, The Barbizon Corporation ("Barbizon") respectfully prays that a writ of certiorari issue to review an opinion of the United States Court of Appeals for the Second Circuit dated March 18, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 842 F.2d 627 and is reprinted in the Appendix to this Petition at App. A. The denial of rehearing by the United States Court of Appeals for the Second Circuit is reprinted in the Appendix at App. C. The opinion of the United States District Court for the Southern District of New York, dated August 10, 1987, is reported at 667 F. Supp. 994 and is reprinted in the Appendix at App. B.

JURISDICTION

The District Court had jurisdiction over this action under 28 U.S.C. §§1331 and 2201. The Court of Appeals had jurisdiction under 28 U.S.C. §1291. The judgment of the Court of Appeals is dated March 18, 1988, and was entered on that same date. A timely Petition for Rehearing in banc was denied on June 2, 1988. This Court has jurisdiction under 28 U.S.C. §1251(1). By order dated August 18, 1988, Petitioner was granted until September 30, 1988, to file its Petition for a Writ of Certiorari in this matter.

STATUTE INVOLVED

United States Code, Title 29:

§1397. Application of 29 U.S.C. §§1381 et seq. in case of certain pre-1980 withdrawals; adjustment of covered plan.

(a) For the purpose of determining the amount of unfunded vested benefits allocable to an employer for a partial or complete withdrawal from a plan which occurs after September 25, 1980, and for the purpose of determining whether there has been a partial withdrawal after such date, the amount of contributions, and the number of contribution base units, of such employer properly allocable:

(1) To work performed under a collective bargaining agreement for which there was a permanent cessation of the obligation to contribute before September 26, 1980, or

(2) To work performed at a facility at which all covered operations permanently ceased before September 26, 1980, or for which there was a permanent cessation of the obligation to contribute before that date,

shall not be taken into account.

(b) A plan may, in a manner not inconsistent with regulations, which shall be prescribed by the corporation, adjust the amount of unfunded vested benefits allocable to other employers under a plan maintained by an employer described in subsection (a).

STATEMENT OF THE CASE

This matter was submitted to the lower court on a stipulated record and decided on cross-motions for summary judgment. The action arose as a result of a demand by the ILGWU National Retirement Fund ("the Fund") that Barbizon pay to the Fund in excess of $1.5 million in withdrawal liability, primarily based upon Barbizon's termination of its operation at Provo, Utah, in June of 1980. Prior to that time, Barbizon of Utah, Inc., a wholly owned subsidiary of Barbizon, was primarily engaged in the manufacture of finished garments for Barbizon. App. F, at A44. Barbizon asked for a declaratory judgment under 28 U.S.C. §2201 and under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendment Act of 1980 ("MPPAA"), and the Deficit Reduction Act of 1984 ("DEFRA"), requesting that the court declare that certain exceptions to amounts of

withdrawal liability be applied.[1] The matter was submitted on a stipulated record, but the lower court refused to apply the applicable exceptions spelled out in the statute.

The withdrawal liability in question was triggered by the aforementioned closure of Barbizon's Provo manufacturing facility for economic reasons, including high labor costs, excessive transportation costs due to the location of the Provo facility, and the lack of a West Coast market. App. E, at A38. The announcement of the plant closure was made on November 30, 1979 to the ILGWU-represented employees at Provo, App. D, at A34, who at the time were covered by master and supplemental collective bargaining agreements in effect from February 1, 1977, until January 31, 1980. App. R, T, at A96, 123. The supplemental agreement was separate from any other agreements covering employees of other Barbizon subsidiaries, and it contained different benefits, hours of work, rates of pay, and other terms of employment. App. E, at A40-41. In fact, the production employees at the Provo plant were considered a separate bargaining unit. App. E, at A40. Barbizon of Utah also maintained its own separate payroll, bookkeeping, bank accounts, legal counsel, and real estate from other Barbizon subsidiaries. *Id.*

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1. Through ERISA §4217, Congress had attempted to eliminate the unfairness of retroactive withdrawal liability for employers withdrawing from a multi-employer pension plan, by excluding contributions allocable to work performed under a collective bargaining agreement for which there was a permanent cessation of the obligation to contribute before September 26, 1980 (the effective date of MPPAA); or to work performed at a facility at which all covered operations permanently ceased before September 26, 1980, or for which there was a permanent cessation of the obligation to contribute before that date.

Barbizon representatives met with ILGWU representatives on March 14, 1980, to discuss the closing and ultimately entered into a separate agreement covering that matter. App. Q, D, at A90, 32. In the agreement, which was entered into on June 24, 1980, the parties agreed that the 1977-1980 Master Agreement (which had expired on January 1, 1980) would be extended until June 30, 1980, and that Barbizon's obligation to contribute to the ILGWU National Retirement Fund on behalf of work performed by ILGWU-represented employees at Provo would expire on June 30, 1980. App. Q, D, at A91, 94, 32.

The Provo plant was completely shut down for production purposes before July 1, 1980. App. H, at A48. As a result of the closing, major changes occurred in the manufacture of garments, 90% of which had been produced by the Provo factory. All of the garment inventory was subsequently obtained from independent contractors because Barbizon had lost its productive capacity (until it opened its non-union plant in Puerto Rico over a year later). App. E, Z, at A42, 214-15, 218. This was accomplished by shipping fabric to an independent contract cutter, who in turn shipped the cut fabric to other independent contractors to complete the manufacture. App. E, at A42. Barbizon had no control over the working conditions, hours, wages, shifts, benefits, seniority, or promotions of the employees in any of the manufacturing facilities owned or operated by independent contractors with whom Barbizon contracted. App. E, at A43. Neither Barbizon nor any of its subsidiaries had any partial or complete ownership of any of the domestic independent contractors with whom Barbizon contracted. *Id.* The work was con-

tracted out to union and non-union contractors as well as to Barbizon's non-union plant in Puerto Rico. App. CC, Z, at A285, 288, 214-18.

When the Provo plant closed, no production, supervisory, or management employees of Barbizon of Utah transferred to the employ of any independent contractors with whom Barbizon had contracted. App. E, at A43. Approximately two-thirds of the manufacturing equipment used at the Provo facility was sold to a West Coast buyer with whom Barbizon and its subsidiaries had no further dealings. App. E, at A41. Some of the specialized equipment was sold, leased, lent, or stored. *Id.*

On June 17, 1983, the Fund demanded that Barbizon pay the amount of $1,590,139 as withdrawal liability under the newly-enacted MPPAA, primarily based upon Barbizon's termination of its operation in Provo. App. I, D, at A49, 29. In accordance with its rights under the statute, Barbizon thereafter responded at length to the demand, setting forth in detail the basis for its dispute with the assessment, and requesting certain information relevant to the demand as well as a review. App. J, D, at A54, 30. Among other things, Barbizon asked that the Fund recalculate its withdrawal liability on a basis which would exclude contributions properly excludable under 29 U.S.C. §1397. *Id.*

The Fund responded to Barbizon's request for review on or about December 8, 1983, but did not alter its demand for payment. App. K, D, at A64, 30. It did not respond to Barbizon's statutory defense.

Barbizon thereafter timely demanded arbitration of the disputed amount on February 1, 1984. It again raised

the applicability of 29 U.S.C. §1397, but the Fund did not respond in writing. App. L, D, at A66, 30. Once Congress voided the retroactivity of MPPAA by enacting DEFRA, Barbizon again demanded arbitration of the dispute by letter dated September 18, 1984. App. M, at A70. The Fund failed to respond to that request.

Throughout the relevant period of time, Barbizon has paid and continues to pay each quarterly installment assessed by the Fund. App. D, at A29. Such payments are required pending arbitration under 29 U.S.C. §1401(d).

In view of the parties' inability to resolve this dispute, an action for a declaratory judgment was brought by Barbizon in district court. An appeal to the United States Court of Appeals for the Second Circuit followed, resulting in an affirmance of the District Court's decision.

REASONS FOR GRANTING THE WRIT

The court below held that the closing of Barbizon's Provo plant, the termination of its several hundred unionized employees, the sale of the plant and most of the equipment, and the subsequent production of the same work by non-union sources was a "non-event" under MPPAA not subject to complete or partial withdrawal liability or to the corresponding exemption under ERISA §4217. The basis for this finding was that from a functional perspective, Barbizon "did not remove any productive operations from the coverage of the pension plan." App. A, at A11-12. This is contrary not only to the stipulated facts in this case, but to the court's own finding that the pension fund contributions did in fact decrease.

App. A, at A12. Moreover, it contravenes the explicit provisions of the statute, recent rulings of this Court applying a plain meaning to the language of the statute, and public policy considerations governing the ability of funds to assess partial withdrawal liability in the future when employers shift work from unionized plants to non-union sources.

In the usual case, the pension fund would be arguing Barbizon's position herein; the pension fund would normally be arguing that the facts described above constitute an "event" under MPPAA such that withdrawal liability should be imposed. However, because this case also involves application of a specific exception to certain withdrawal liability for events occurring prior to MPPAA's effective date, the Fund has argued in favor of a ruling which is of short-term expedience in assessing the instant liability, but which will have disastrous results in future cases. Indeed, as will be shown, this exact situation is expressly covered by the partial withdrawal rules, which impose liability when an employer's contribution obligation partially ceases but the employer continues to perform work in the jurisdiction or transfers it to another location. Since the parties agree that §§4217 (the exemption statute) and 4205 (partial withdrawal rules) are governed by the same principles, if the exemption is not applied to the facts herein, then neither this nor any other fund will be able to declare partial withdrawals in similar plant closings in the future. These rules should not be rewritten in this case merely because the §4217 exemption from liability for events occurring prior to September of 1980 is also invoked by the stipulated facts.

I. The Decision Below Raises Important Questions Regarding the Right of a Fund to Refuse to Apply a Statutory Exemption Under ERISA §4217 When the Stipulated Facts Show the Closing of a Facility and a Decline in Contributory Operations at That Facility Prior to the Designated Cutoff Date.

Prior to 1980, an employer's liability to a multi-employer pension plan was limited to those contributions required by the applicable collective bargaining agreement. An employer who ceased contributing to or withdrew from the plan had no liability unless the plan itself terminated within five years following the employer's withdrawal with insufficient assets to discharge vested benefits. In September of 1980, Congress enacted MPPAA, which changed this scheme and imposed unexpected liabilities on employers by permitting a multi-employer pension plan to demand payment of an amount based on the withdrawing employer's proportional share of the unfunded vested liability of the plan, determined from the employer's "contribution base" (the total of an employer's contributions over a period of years before the withdrawal).

Because Congress wished to alleviate some of the initial unfairness of such liability (which would necessarily be based in part on contributions made before the enactment of MPPAA), it adopted two exceptions to the general rule, codified in 29 U.S.C. §1397(a), ERISA §4217(a), *supra*. Briefly, if an employer's obligation to contribute to a plan under a collective bargaining agreement ceased prior to MPPAA's enactment or if a facility closed or an obligation to contribute for work performed

at a facility ceased prior to its enactment, then an employer could exclude from the withdrawal liability calculation contributions attributable to that collective bargaining agreement or to work performed at that facility.

Application of either one of these exceptions entitles an employer to a reduction in withdrawal liability. Both exceptions apply to the stipulated facts herein, as shown below and in II, *infra*.

A. The court below has decided an important question under ERISA in a way that conflicts with recent decisions of this Court favoring a plain meaning of statutory language under ERISA.

The parties stipulated on the record that Barbizon closed its Provo plant prior to September 26, 1980. App. D, at A31, 34, 35. Under §4217(a)(2), contributions allocable to work performed "at a facility" which closed before September 26, 1980, may not be taken into account in determining an employer's withdrawal liability. Application of this language to the stipulated facts shows that Barbizon is entitled to relief.

The term "facility" is not defined in the statute. Absent any statutory definition, the plain meaning of the statute must govern.

Indeed, courts prefer the plain meaning of a statute. *Statutes and Statutory Construction* ¶¶47.27, 47.28 (4th Ed. 1972). In two recent cases, this Court has favored a plain meaning in interpreting other sections under ERISA. Thus, in *Laborers' Health and Welfare Trust Fund for Northern California et al. v. Advanced Light-*

weight Concrete, Inc., ... U.S. ....., 108 S.Ct. 830, 98 L.Ed.2d 936 (1988), the Court adopted the plain reading of the enforcement provisions of ERISA over policy arguments favoring a broader interpretation. According to the Court, Congress' intent was so plain as to preclude policy arguments to the contrary. More recently, in *Mackey et al. v. Lanier Collections Agency & Service, Inc.*, ... U.S. ....., 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988), the Court emphasized that it is necessary to look at the language of ERISA and its structure in determining the intent behind the original enactment.

Other courts have followed this lead. *See, Massachusetts Laborers' Health and Welfare Fund, et al. v. Starrett Paving Corp.*, 845 F.2d 23 (1st Cir. 1988), (adoption of plain meaning for the term "employer," based upon the plain language of ERISA and the effect that a broader definition might have on other sections of the statute).

In interpreting §4217 of ERISA, the plain meaning dictates a different result than that reached by the court below. In fact, other courts and arbitrators have specifically adopted a plain meaning for the term "facility." For example, in *United Mine Workers' 1974 Pension Plan and Williamson Shaft Contracting Co.*, 6 EBC 1593 (Pritzker, 1985), the arbitrator relied upon the dictionary definition of "facility" as "something (as a hospital) that is built, installed, or established to serve a particular purpose." *Id.* at 1603-4.

In *May Stern & Co. and Western Pennsylvania Teamsters and Employers Pension Fund*, 8 EBC 2202 (1987), Arbitrator Nagle, formerly executive director of the Pension Benefit Guaranty Corporation ("PBGC"),

held that each of a furniture retailer's stores and warehouses was a separate "facility" for MPPAA withdrawal liability purposes, relying upon the normal usage of the term and the separate economic function and physical separateness of the various locations:

> Moreover, I believe that the fund's emphasis upon the May Stern operation being a "single economic unit," and its warehouses not being "independently viable economic units," misses the point. I assume that this emphasis derives from the previously cited language in the PBGC opinion letters and MPPAA's legislative history with respect to a "facility" being regarded as "an economic unit" of the employer's business—language which in turn was clearly derived from the Standard Industrial Classification's definition of "establishment." There is nothing about that language that suggests that an "economic unit" must be "independently viable" or that a separate location may not be an "economic unit" merely because it operates as part of a larger business organization. On the contrary, I believe it is clear from the Standard Industrial Classification as well as from the Supreme Court's decision in *Phillips v. Walling* and cases following it, that *each store and warehouse in a retail chain is considered to have its own economic function in the employer's overall business, and within that context derives its identity as an "establishment" or "facility" from its permanent physical separateness. That is the concept which is reflected in the PBGC opinion letters and which I believe is appropriate to follow here.*

Id. at 2215 (emphasis added).

The plain meaning has also been followed by the PBGC. In Opinion Letter 82-33 (October 28, 1982), it held that the term "facility" in §4217, in the context of the retail food industry, ordinarily means a single store. App. GG, at A310. This was reaffirmed in Opinion Letter 86-2 (January 31, 1986), App. HH, at A313, where a separate store in a retail food chain was considered a separate facility, based upon generally accepted economic terminology under which "facility" means a discrete economic unit of an employer, and upon the longstanding definition of the term "establishment" used in the Standard Industrial Classification Manual and the definition of "facility" that Congress considered promulgating with respect to partial withdrawal rules. *See also*, Opinion Letter 82-22 (August 3, 1982). App. II, at A317.

At least two courts have rejected a more expansive definition of "facility." In *Meatcutters' Local 88 Pension Plan v. Del Monte Supermarkets*, 565 F. Supp. 27 (E.D. Mo. 1983), vac. upon jt. mot. of parties, 4 EBC 2168 (8th Cir. 1983), the court relied upon the preposition "at" in the statutory language to hold that §4217 pertains to work performed "at a facility at which all covered operations permanently ceased," meaning a single location.

Likewise, in *Central Pennsylvania Teamsters Pension Fund v. Royal Swan Foods, Inc.*, C.A. No. 84-4163 (E.D. Pa. 1985) (dis. with prej. and vac. on jt. mot. of parties as part of settlement) App. FF, at A300, the court held that the language of §4217 *precludes* a definition in which "facility" equates with all operations covered under a single collective bargaining agreement. Cf., *Walt's Supermarkets, Inc. and Indiana Area Food and Commercial Pension Plan*, 4 EBC 1494 (Hannan, 1983) (arbitrator's expanded definition of "facility" was based upon express

contract provision defining that term); *Buy-Low of Cassopolis, Inc. and Board of Trustees, Food Workers' Pension Plan,* 5 EBC 2641 (Bowles, 1984) (arbitrator's definition turned on past practice of the parties recognizing a more extensive meaning of facility).

In the instant case, the separateness of the Provo plant is undisputed on the record. A separate supplemental agreement covered work performed by ILGWU-represented employees in Provo. App. D, R, S, at A31, 96, 113. The parties to the Provo agreement (Barbizon of Utah and The Barbizon Corporation) are different from the parties to the agreement covering work performed by ILGWU-represented employees in Pinebrook, New Jersey. App. R, S, at A97, 114. Holidays and holiday pay under the two agreements are different. App. R, S, at A104, 117. Employee benefits are different. App. R, S, at A109, 121.

Moreover, the Provo factory was owned by Barbizon of Utah, Inc. App. E, at A37. Its business was the manufacture of finished garments designed by others and minimal retailing, while The Barbizon Corporation was involved primarily with designing and wholesaling garments produced by others. App. F, at A44. All records, including payroll, bookkeeping, and bank accounts, were separately maintained by Barbizon of Utah. App. E, at A40. Clearly, the Provo factory was a physically separate installation at a single location and was different from every other operation owned or operated by Barbizon of Utah, a separate economic unit of The Barbizon Corporation.

Even union counsel described the various installations operated by Barbizon as "plants" or "facilities," in

a brief filed by the ILGWU with the National Labor Relations Board on June 22, 1983. These references indicate that "facility" is a synonym for "plant," "factory," or "establishment." App. X, at A202-4. In fact, in June of 1983, at a time when he was a trustee of the Fund, Wilbur Daniels stated in sworn testimony before the National Labor Relations Board that Barbizon's separate plants were "facilities," using that term as a synonym for "plant." App. Y, at A208-12. The Fund's application to the PBGC for special withdrawal liability rules in 1982 even refers to a manufacturer's inside shop as a production "facility." App. AA, at A235. Indeed, Defendant Chaikin himself publicly described the Provo plant as a "facility" in a letter to the *New York Times* several months after the closing of the plant. App. LL, at A329. Thus, both the union and Barbizon clearly regarded the Provo plant as a "facility," even *after* MPPAA's enactment.[2]

Rather than relying on the plain meaning of "facility" and applying it to the Provo plant, the decision below contrived the following definition: "It is that portion of Barbizon's business which was composed of the productive operations that were formerly performed by the workers at the Provo plant and that, after June 30, 1980, were performed by outside contractors." App. A, at A11. Not only does this definition ignore the rules of statutory construction, but (as will be shown, *infra*), it actually confuses this requirement with the alternative requirement of §4217(a)(2).

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2. Indeed, the parties were in agreement in the lower courts that the term "facility" means the same under §4217 as it does under the rules governing partial withdrawals, where partial withdrawal liability is imposed when an employer closes a facility and transfers the work to another location (as explained more fully, *infra*).

The Court primarily relies upon *Paperworkers' Local 286 Pension Plan and Kardon Industries, Inc.*, 6 EBC 2398 (1985), for the proposition that a shift in operations from one location to another may constitute a continuation of operations "at a facility." However, the facts in that case showed that there was indeed a continuation of the same operation; the employer transferred its operations, employees, and equipment intact from Philadelphia to New Jersey, only several miles away. It remained in control of the production facility, the equipment, and the employees, which were essentially identical at the new location. By contrast, Provo's production employees did not transfer to another facility, nor did the employees transfer to any independent contractor with whom Barbizon subsequently did business. Once the Provo facility closed, production previously performed in-house was contracted out to many different contractors located throughout the eastern United States and abroad. App. E, at A41. The closest such independent contractor was more than 1,000 miles away from Provo. *Id.*

Since Barbizon lost its entire productive capacity, laid off all of its employees, sold all but a fraction of its equipment, and lost control over production schedules, costs, and quality, no shift in operations occurred within the meaning of *Kardon Industries.*

In fact, in *Royal Swan Foods, supra,* the court expressly relied upon the fact that the company went from an in-house distribution operation to the use of purchased goods from independent contractors in finding a facility closing. The facts showed that before the facility in question closed, it supplied goods to other facilities, but afterwards, the goods were purchased from other sup-

pliers. Moreover, the parent company, which made contributions to the Fund on behalf of all covered employees, did not effect a complete withdrawal until after the effective date of MPPAA. Even though the in-house operation was replaced by the use of outside contractors, and despite evidence that some equipment and two former employees were transferred to another subsidiary, the court found no significant "shift" of operations. Accordingly, it found that a facility closing had occurred under §4217.

The decision below thus departs from well-established authority by this Court and others mandating a plain reading of the provisions of ERISA. Provo was clearly a "facility" under the statute, and the facts show no shift in operations. Quite the contrary, the facts show that the Provo facility, which had manufactured over 90% of the garments sold by Barbizon, was completely shut down prior to September 26, 1980. App. D, at A34. Based on these facts, the exemption of §4217(a)(2) must be applied.

B. A fund may not refuse to apply the "facility closing" exemption of §4217(a)(2) when the stipulated facts show a decline in contributory operations at a facility.

ERISA §4217(a) is written in the alternative—either there must be a closing of a facility (as shown, *supra*) *or* the obligation to contribute for work performed at the facility must have ceased. The parties stipulated on the record that "Barbizon's obligations to make contributions under a collective bargaining agreement to the Fund on behalf of employees located at Plaintiff's Provo,

Utah, plant ceased prior to September 26, 1980." App. D, at A34. Clearly, then, the Fund admitted that there was a permanent cessation of the obligation to contribute for work performed at the Provo facility.

The statute only requires that there be a permanent cessation of the obligation to contribute for work performed *at a facility*. As shown, *supra*, the Provo plant was a facility as defined by the PBGC, courts, and arbitrators, and Barbizon is therefore entitled to the relief provided in §4217.

The court below concluded that the Provo plant was not a "facility." However, it nevertheless recognized that that did not end the inquiry since Barbizon could still recover if it established a reduction in contributory operations at Provo as well as other locations, i.e., a reduction in contributory operations at the Provo "facility" under the court's expansive definition.

In analyzing this part of the statute, the lower court relied exclusively on case authority in which the evidence showed no decline in contributory operations. App. A, at A10-12. It found that Barbizon "did not remove any productive operations from the coverage of the pension plan" when it closed its Provo plant and terminated its workers, App. A, at A11-12, while at the same time finding that Barbizon "did benefit from a reduction in the amount of contributions that it paid to the Fund after closing the Provo plant . . ." *Id.* at A12.

The record shows that productive operations were removed when Barbizon closed the Provo plant. Based on the figures provided by the Fund itself, there was at least an 80% decline in contributions because of the

Provo closure.[3] In fact, this enormous decline is actually greater than the numbers reflect because such factors as annual wage rate increases and increases in contribution percentages are not taken into account. The decision below failed to address this stipulated evidence.

The evidence showing a dramatic shift from contributory to non-contributory operations is underscored by evidence of where the work went. After Provo closed, a significant amount of the work was performed by non-union contractors (i.e., non-contributory operations), as shown in the ILGWU audits. During the audit year immediately following the Provo closure (February 1, 1981, to January 31, 1982), liquidated damage payments of $190,356 were due for work performed by non-union contractors,[4] App. CC, at A286, 288, compared to only $31,067 in contributions to the Fund for union operations in 1981. App. DD, at A296. In fact, the stipulated record is replete with evidence of this shift. For example, the evidence shows that the union successfully pursued a grievance demanding liquidated damages in excess of

---

3. This is based on evidence showing that contributions on behalf of union contractors increased by only $26,506 between 1979 and 1980 (the year Provo closed), while the decrease attributable to the Provo closure was over $140,000. App. DD, at A294-5. The difference between the two thus shows a net loss of $113,494 in contributions, which is equivalent to an 81% decline in contributions immediately following the Provo closure. This decline is reinforced by the figures provided by the Fund which show actual contributions made—$171,422 in 1979; $70,250 in 1980; and $31,067 in 1981. App. DD, at A296. Thus, there was a 59% decline in contributions during 1980; if contributions made that year for Provo work are excluded, the figure shows an 80% decline in contributions. Comparing contributions for the year preceding and the year following the Provo closure, contributions declined from $171,422 in 1979 to $31,067 in 1981—a decline in contributions of over 81%.

4. Liquidated damage payments are due to the *union* and not to the fund and do not constitute contributory operations. App. V, at A187-8; App. Z, at A215-16.

$200,000 due to Barbizon's use of non-union outside contractors and sought additional damages for Barbizon's operation of a non-union shop in Puerto Rico. App. Z, at A215. Since the authority relied on by the court is based on the lack of any decline in contributory operations, it cannot stand in light of the record.

As mentioned, the decision below is rife with inconsistencies. Thus, it initially states that there was no loss of productive capacity when Provo closed. App. A, at A11. However, the court also finds that there was a reduction in the amount of contributions which Barbizon paid to the Fund after Provo closed. App. A, at A12. Based on these two findings, a significant amount of the production clearly had to have come from non-union sources, which is inconsistent with the finding that there was no loss of productive operations from the coverage of the union pension plan when Provo closed. App. A, at A11-12.

In analogous contexts, these facts have triggered the applicable statute. For example, in *Dunkard Creek Coal, Inc. and United Mine Workers of America 1950 Pension Plan,* 9 EBC 1825 (Hughes, 1988), the arbitrator found that a complete withdrawal had occurred when an employer's contribution obligation ceased after it continued to conduct coal brokerage operations with non-unionized employees, following cessation of its mining operations with unionized employees.[5] As in the instant case, a change from union to non-union operations was the triggering event for imposition of the liability (or exemption from liability).

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5. As with the exemption under §4217, the operative factors for a complete withdrawal are whether an employer permanently ceases to have a contribution obligation or whether it permanently ceases covered operations.

In fact, the PBGC has held that withdrawal liability is incurred when an employer contracts out the work on which contributions to a multi-employer plan are based. (Opinion Letter 85-32, App. JJ, at A319.) In the instant case, there was clearly a loss of productive operations from the coverage of the union pension plan when Provo closed and contracted out its work, and as conceded by the Fund in its briefs to the lower court, the §4217 exemption applies to "a switch from contributory to non-contributory operations," or to a "defined reduction" in contributory operations. App. MM, at A333-5. Furthermore, the Fund in its submission to the PBGC emphasized that partial withdrawals [and hence the §4217 exemption] apply where "an employer *does* take a piece of the industry with him by continuing to compete on a non-contributory basis . . . ." App. AA, at A246. The lower court ignored these concessions by the Fund.

The fact that some of the work was contracted out to union contractors does not alter this conclusion. This precise issue has been addressed in the context of the construction industry, where (as with a partial withdrawal) an employer is considered to have withdrawn from a plan (under ERISA §4203(b)(2)) when it reduces the plan's contribution base by continuing to perform covered work without an obligation to contribute for that work. In *H. C. Elliott, Inc. v. Carpenters' Pension Trust Fund for Northern California*, 663 F. Supp. 1016 (N.D. Calif. 1987), the Court rejected an argument by the employer that it should be relieved of withdrawal liability because 80% of the work went to *union* contractors:

> Elliott's contention that 80% of its recent carpentry work has resulted in contributions to the Trust Fund cannot relieve it of withdrawal liability unless

> this court is willing to make wholesale changes to the statutory language adopted by Congress. Section 1383(b) is simply devoid of any suggestion that a 'small' erosion in contributions can either be forgiven or result in a reduced liability. Under the statutory scheme, an employer either 'ceases to have an obligation to contribute under the plan' or it does not, and an employer either 'continues to perform work' or it does not. If these criteria are met, withdrawal liability is imposed. This might be a different case if 100% of Elliott's carpentry subcontracting work since the time of its withdrawal had been performed by union subcontractors. Such a case would not involve any erosion of contributions. However, the court is not presented with that question.
>
> Nor can it be said that such a bright line test is inconsistent with Congressional intent. It serves to prevent employers from 'inching away' from a pension trust fund, which indeed appears to be what has happened here. . . .

8 EBC at 2126-7. In fact, the Fund has represented to the PBGC that where there is a shift to non-union work "withdrawal liability is both appropriate and necessary;" hence, the pre-MPPAA exemption would apply. App. AA, at A246.

Based on all of the above, Barbizon is entitled to the exemption in §4217(a)(2).

C. The Court below has decided an important question under ERISA in a way that conflicts with decisions of this Court defining the limitations of summary judgment.

Not only has the court below disregarded clear statutory language applicable to the facts on the stipulated

record, but it has decided this matter on motions for summary judgment. Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is only appropriate where there is no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. If there is a genuine issue as to a material fact, the case should go to trial. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); 6 *Moore's Federal Practice*, ¶56.04[1]. In making such a determination, inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *U.S. v. Diebold, Inc.*, 369 U.S. 654 (1962). Disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). As this Court has noted:

> . . . [S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party. In *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 20 L.Ed.2d 569, 88 S.Ct. 1575 (1968), we . . . observed . . . that
>
> > [i]t is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial. 391 U.S., at 288-289, 20 L.Ed.2d 569, 88 S.Ct. 1575.

Id. at 211-12.

Summary judgment to the Fund was inappropriate on the stipulated record herein. Material, uncontroverted evidence was presented of a substantial decline in contributory operations which would entitle Barbizon to the exemption at issue. At the very least, an issue was created as to the extent of any such decline. In either event, summary judgment was improper.

II. The Decision Below Raises Important Questions Regarding Future Assessments of Withdrawal Liability for Partial Withdrawals and in Other Contexts.

The decision of the court below has consequences far beyond those resulting from a single instance of the denial of an exemption to a single employer who closed a single plant. By refusing to apply the exemption of §4217(a)(2) as a result of the reduction in contributory operations, the lower court has really said that closing an establishment such as the Provo plant and shifting a major portion of the work to non-union labor is a "non-event" under MPPAA. Under the law of this case, funds would be precluded from imposing liability in other contexts, such as post-MPPAA partial withdrawals, and not just those involving application of the §4217 exemption, as here.

A partial withdrawal occurs when, during a plan year, an employer's contributions to the plan decline by a specified amount *or* the employer's contribution obligation partially ceases. 29 U.S.C. §1385(a). A partial cessation of the obligation to contribute can occur in one of two ways: either (1) the contribution obligation expires under one or more but less than all of an employer's collective bargaining or related agreements, but the employer continues to perform work in the jurisdiction of

the type for which contributions were previously required or transfers the work to another location, or (2) the contribution obligation ceases with regard to one or more but less than all of the employer's facilities, but the employer continues to perform work at the facility of the type for which the obligation ceased. The practical application of this type of withdrawal was explained by Senator Williams, a co-sponsor of MPPAA:

> Examples of these two situations are where an employer bargains out of making contributions to a plan that the employer was previously required to make under a collective bargaining agreement that is otherwise in effect with respect to other requirements, or, where work that was undertaken at one geographic location for which contributions were made is transferred by the employer to another of his plants at a different geographic location where contributions to a plan for the work performed are not required.

126 Cong. Rec. 23287 (August 26, 1980). Clearly, MPPAA contemplates that partial withdrawals can result from a shift from in-house production to production by independent contractors, as was done here. Moreover, the §4217 exemption applies to both complete and partial withdrawals occurring prior to September 26, 1980.

However, accepting the lower court's broad meaning of the term "facility," liability could not be imposed upon an employer who continued to perform work "at the facility" after an obligation to contribute ceased, i.e., who continued to have the same productive operations performed, albeit by outside workers. Under the law of this case, the work performed by outside contractors would nevertheless be "the product of the same facility."

App. A, at A12. In fact, an employer who simply shifted its operations into a new building across the street but continued to utilize a small amount of union work would avoid liability, even if it retained all the same employees and continued the same level of production. Similarly, liability could not be imposed where the union had been decertified, as long as another agreement still required contributions elsewhere. In short, there would no longer be any withdrawal liability in cases such as *H. C. Elliott, Inc. v. Carpenters' Pension Trust Fund for Northern California, supra; Fraser Shipyards, Inc. & IAM National Pension Fund,* 7 EBC 2562 (Cornelius, 1986), and *Loomis Armored, Inc. and Central States Pension Fund,* 8 EBC 1899 (Tylove, 1987), where partial withdrawal liability has heretofore been imposed.

There can be no clearer application of the partial withdrawal rules than occurred in this case. Even under the lower court's expansive definition of "facility," the facts present a classic example of a partial cessation of the obligation to contribute wherein the obligation expires under less than all of an employer's collective bargaining or related agreements, but the employer continues to perform work in the jurisdiction or transfers the work to another location.

Indeed, some courts have recognized a partial withdrawal on the basis of the exclusion of a significant number of participants, particularly in connection with a major corporate event such as the elimination of a division or a plant closing. For example, in *Weil & Galuppo v. Retirement Plan Administrative Committee of the Terson Co., Inc. et al.,* 750 F.2d 10 (2d Cir. 1988), the court remanded the case for a determination of whether the employer had dismissed "a significant num-

ber" of employees in closing part of its operation, thus triggering a partial withdrawal. The district court, on remand, found that a partial termination had occurred in connection with dismissal of 33% of the employees following relocation and closing of several divisions. No. 82 CIV 8468 (S.D. N.Y. 1988), App. KK, at A321.

Not only is the language of the partial withdrawal and exemption sections similar, but the parties are in agreement that the two sections are to be interpreted and applied in the same manner. App. MM, at A333. A transfer of work to non-contributory sources such as occurred here triggers both sections and should have been applied as such by the lower court.

The decision below also affects other sections of ERISA. For example, its definition of a facility closing directly affects a plan's duty to notify the PBGC of a "facility shutdown," currently a reportable event under ERISA §4062(f). Since such events generally indicate a possible danger of termination of a defined benefit plan insured by the PBGC, eliminating the reportable status of such an event could be disastrous. In short, the decision below is detrimental to other portions of the statute and cannot be permitted to stand.

III. The Decision Below Raises Important Questions Regarding the Right of a Fund to Refuse to Apply the Collective Bargaining Agreement Exemption of ERISA §4217(a)(1) When the Stipulated Facts Show Cessation of the Obligation to Contribute for Work Performed Under Such an Agreement Before MPPAA's Effective Date.

Separate relief is available under subpart (1) of §4217(a) for contributions allocable "to work performed

under a collective bargaining agreement for which there was a permanent cessation of the obligation to contribute before September 26, 1980." Although finding that Barbizon did cease to have an obligation to contribute for the Provo plant after June 30, 1980, the lower court nevertheless concluded that Barbizon remained bound under the Master Agreement to contribute for whatever other operations it continued to engage in. App. A, at A8. This conclusion cannot be squared with the undisputed facts or the clear statutory language.

The stipulated record shows that the 1977-80 Master Agreement expired on February 1, 1980, and that another Master Agreement was not agreed upon until June 19, 1981, nearly a year after Provo had closed under the terms of the June 24 agreement and a year and a half after the prior Master had expired. App. V, Z, at A198-200, 218. Therefore, during the pertinent period, the only agreement in effect was the June 24 Agreement. The obligations with respect to other operations referred to by the lower court did not even come into existence until over a year afterwards. At the very least, there is an issue of fact as to when such obligations arose and expired.

Moreover, there is nothing in the statute requiring that all obligations to contribute expire under all agreements before the exemption can be applied. The statute plainly excludes contributions allocable to work performed "under *a* collective bargaining agreement for which there was a permanent cessation of the *obligation to contribute* before September 26, 1980." "Obligation to contribute" is defined as an obligation arising "under one or more collective bargaining (or related) agreements." 29 U.S.C.

§1392(a). Similarly, the partial withdrawal rules require that the obligation expire "under *one or more but less than all* of an employer's collective bargaining or related agreements." 29 U.S.C. §1385(a). Therefore, under clear statutory language, it does not matter that there may have been other obligations involving other operations. As long as the obligation to contribute for the Provo plant had ceased (as found by the lower court), then there was a "permanent cessation of the obligation to contribute" for "work performed under a collective bargaining agreement," entitling Barbizon to relief.

There is no disagreement that the exemption would apply if the employer's overall obligation was established by more than one collective bargaining agreement. In that case, cessation of the obligation under one of those agreements prior to MPPAA would invoke §4217(a)(1). Significantly, the Fund admitted in a letter sent to counsel for Barbizon in 1982 that Barbizon's obligation was indeed established by more than one collective bargaining agreement. App. P, at A80. The Fund has thus admitted that Barbizon is entitled to this relief.

Even the agreements themselves demonstrate that there was an obligation to contribute under more than one collective bargaining agreement, and that in any event, the June 24 Agreement (under which the obligation with respect to the Provo plant ceased) took precedence over the Master Agreement in question. Thus, the 1980-83 Master Agreement did not contain any obligation to contribute a defined amount to the Fund. App. V, at A179-183. Article XXIX(1)(b) provided that the employer was to make payments set forth in the applicable plant supplemental agreements. App. V, at A179. Moreover, Article XXXVIII underscored this principle by stat-

ing that "[w]here a plant supplemental agreement provides terms which differ from those of this Master Agreement the provisions of the plant supplemental agreement shall govern." *Id.* at A192. Clearly, then, not only was any obligation dependent upon the June 24 Agreement, but the June 24 Agreement took precedence under the provisions of the 1980-83 Master Agreement.

The June 24 Agreement specifically provided for the termination of any obligation with respect to Provo after June 30, 1980. The obligation to contribute ended with respect to Provo at that time, and this was specifically reinforced by the subsequent 1980-83 Master Agreement. Thus, there was a permanent cessation of the obligation to contribute for work performed under a collective bargaining agreement prior to the effective date of MPPAA. The lower court therefore should have applied the exemption as stated in §4217.

CONCLUSION

For these reasons, Barbizon respectfully urges this Court to issue a writ of certiorari to the Court of Appeals for the Second Circuit and to accept this case for review.

Respectfully submitted,

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No. 88-

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In the Supreme Court of the United States

OCTOBER TERM, 1988

THE BARBIZON CORPORATION,
Petitioner,

vs.

ILGWU NATIONAL RETIREMENT FUND,
SOL C. CHAIKIN, and
JOSEPH MOORE,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 622—August Term, 1987

(Argued: January 20, 1988 Decided: MAR 18, 1988)

Docket No. 87-7777

THE BARBIZON CORPORATION,
Plaintiff-Appellant,

-v-

ILGWU NATIONAL RETIREMENT FUND,
SOL C. CHAIKIN and JOSEPH MOORE,
Defendants-Appellees.

BEFORE:

LUMBARD, KEARSE, and PIERCE,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Weinfeld, *J.*), entered upon a decision denying appellant's motion for summary judgment, granting appellees' cross-motion for summary judgment, and rejecting appellant's challenge to a determination of its liability for a pro rata share of unfunded vested pension plan benefits.

Affirmed.

JAMES W. WIMBERLY, Jr., Esq., Atlanta, Georgia (Wimberly, Lawson, Cobb & Leggio, Atlanta, Georgia, Evan J. Spelfogel, Esq., Summit, Rovins & Feldesman, New York, N.Y., of counsel), *for Plaintiff-Appellant.*

K. PETER SCHMIDT, Esq., Washington, D.C., (Philip W. Horton, Esq., Arnold & Porter, Washington, D.C., Marc E. Richards, Esq., Booth, Marcus & Pierce, New York, N.Y., of counsel), *for Defendants-Appellees.*

PIERCE, *Circuit Judge*:

This case presents a challenge by appellant The Barbizon Corporation ("Barbizon") to a determination of its liability to contribute to appellee the ILGWU National Retirement Fund (the "Fund"). Appellees Sol C. Chaikin and Joseph Moore are officers of the Fund and members of its Board of Trustees. Barbizon appeals from a judgment of the United States District Court for the Southern District of New York, Edward Weinfeld, *Judge,* entered upon a decision, reported at 667 F. Supp. 994, that denied appellant's motion for summary judgment and granted appellees' cross-motion for summary judgment. We agree with the district court that Barbizon is liable for its assessed share of the unfunded vested benefits in the pension plan, and we therefore affirm.

BACKGROUND

The Fund is a multiemployer pension plan within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, as modified by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. No. 96-364, 94 Stat. 1208. *See*

29 U.S.C. §§ 1002(37), 1301(a)(3) (1982). The Fund provides retirement and other benefits for workers in the garment industry.

Barbizon is a New York corporation engaged in the design and sale of finished garments. Until approximately June 30, 1980, Barbizon, through its wholly-owned subsidiary, Barbizon of Utah, Inc., manufactured most of its finished garments at a plant in Provo, Utah; it also operated a wholesale distribution center at Montville, New Jersey. Barbizon's garment workers were employed pursuant to successive master collective bargaining agreements between Barbizon and the International Ladies Garment Workers Union (the "Union"), which were supplemented by separate agreements covering the employees at Provo and Montville, respectively. Under the master agreements, Barbizon was obliged to contribute to the Fund on behalf of the unionized employees working both at Provo and at Montville. The labor agreements also provided that if Barbizon contracted with other companies to perform any of its production work, with a few limited exceptions, it would only engage the services of companies that also employed workers represented by the Union. Barbizon was also required to contribute to the Fund on behalf of the contractors' employees with respect to any such subcontracted work.

On or about June 30, 1980, Barbizon closed its Provo, Utah plant and terminated the employment of its workers at that location pursuant to a supplementary collective bargaining agreement dated June 24, 1980 that it had negotiated with the Union (the "Termination Agreement"). The work that previously had been performed at Provo was thereafter performed by independent contractors to Barbizon's specifications with fabric supplied

by Barbizon; in some instances, Barbizon sold or lent to these contractors some of the specially-designed equipment that it had used previously at the Provo plant. Barbizon did not discontinue any of its product lines, alter any trademarks, or modify its marketing procedures as a result of closing the Provo plant. And as Barbizon's counsel conceded at oral argument, it did not lose any productive capacity or suffer any diminution of sales, either.

In January 1983, Barbizon withdrew from the Fund within the meaning of the MPPAA, and in June 1983, the Fund assessed Barbizon's withdrawal liability, as required by the MPPAA, *see* ERISA §§ 4201-4225, 29 U.S.C. §§ 1381-1405 (1982 & Supp. III 1985). In essence, the statute requires an employer that withdraws from a multiemployer pension plan to "pay a fixed and certain debt to the pension plan," which represents "the employer's proportionate share of the fund's 'unfunded vested benefits,' calculated as the difference between the present value of vested benefits and the current value of the plan's assets." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 725 (1984) (citing 29 U.S.C. §§ 1381, 1391); *see generally Barbizon Corp. v. ILGWU National Retirement Fund*, 667 F. Supp. at 996-97 (describing purpose of MPPAA). The proportion for which the employer is liable is determined primarily by reference to the extent of the employer's prior participation in the pension plan. *See* 29 U.S.C. § 1391 (1982 & Supp. III 1985); *see generally Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247, 1255-56 (7th Cir. 1983) (describing MPPAA and its effect on prior ERISA requirements), *cert. denied*, 467 U.S. 1259 (1984). However, in calculating the employer's withdrawal liability, the plan

sponsor must exclude from the employer's contribution base, upon which the withdrawal liability is determined, any contributions attributable to work performed at a facility where all covered operations ceased prior to September 26, 1980 (the effective date of the MPPAA, *see* Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494), or to work performed either at a facility or under a collective bargaining agreement for which there was a permanent cessation of the obligation to contribute prior to that date. ERISA § 4217(a), 29 U.S.C. § 1397(a) (Supp. III 1985).

The Fund assessed Barbizon's withdrawal liability at an amount in excess of $1.5 million, which was calculated without excluding contributions attributable to the Provo plant. The Fund's entitlement to collect this withdrawal liability was dependent substantially upon the non-availability of any § 4217 exclusion arising from Barbizon's termination of its Provo operations. Barbizon claims to be entitled to such an exclusion because of the closure of its Provo plant prior to September 26, 1980, pursuant to the Termination Agreement with the Union.

Under protest, Barbizon paid substantially all of the assessed liability and, in November 1985, instituted a declaratory judgment action in the United States District Court for the Southern District of New York, seeking to have the liability assessment set aside and recalculated after excluding any portion attributable to contributions made for work that had been performed at the Provo plant. The Fund counterclaimed for a declaratory judgment that the withdrawal liability assessed was payable in full. The parties entered a joint pre-trial

order of stipulated facts in August 1986, and shortly thereafter cross-moved for summary judgment. Judge Weinfeld heard oral arguments on the motions in October 1986, and on August 10, 1987, he rendered a decision, reported at 667 F. Supp. 994, denying Barbizon's motion and granting the Fund's cross-motion. Judgment was thereafter entered dismissing Barbizon's complaint, and this appeal followed.

The issue presented in this case is whether the conditions for application of § 4217 of ERISA required the Fund to exclude Barbizon's contributions with respect to the Provo plant when it calculated Barbizon's withdrawal liability. We conclude that the requirements of § 4217 were not met and that the Provo contributions therefore were properly included when Barbizon's liability was determined.

DISCUSSION

Section 4217 of ERISA, 29 U.S.C. § 1397 (Supp. III 1985), as amended, reads in pertinent part as follows:

> (a) For the purpose of determining the amount of unfunded vested benefits allocable to an employer for a partial or complete withdrawal from a plan which occurs after September 25, 1980, and for the purpose of determining whether there has been a partial withdrawal after such date, the amount of contributions, and the number of contribution base units, of such employer properly allocable—
>
> > (1) to work performed under a collective bargaining agreement for which there was a permanent cessation of the obligation to contribute before September 26, 1980, or

> (2) to work performed at a facility at which all covered operations permanently ceased before September 26, 1980, or for which there was a permanent cessation of the obligation to contribute before that date,
>
> shall not be taken into account.

A. *Subsection (a)(1)*

Barbizon notes that its obligation to contribute to the Fund with respect to work performed at Provo ceased on June 30, 1980 pursuant to the June 24, 1980 Termination Agreement with the Union. It therefore claims to be entitled to an exclusion under subsection (a)(1) on the ground that, before September 26, 1980, "there was a permanent cessation of the obligation to contribute" to the Fund with respect "to work performed under a collective bargaining agreement." We disagree.

The term "obligation to contribute" is defined in § 4212 (a)(1), 29 U.S.C. § 1392(a)(1) (1982), as one arising "under one or more collective bargaining (or related) agreements." As we read § 4217(a)(1) in light of this definition, we conclude that the requisite cessation of the obligation to contribute must be coextensive with the duty to contribute; only if the obligation to contribute is entirely extinguished will this exclusion apply. We agree with Barbizon that the collective bargaining *agreement* under which the contributory obligation arose need not terminate before the subsection (a)(1) exemption will apply. *See United Food & Comm'l Workers Int'l Union-Ind. Pension Fund v. G. Bartusch Packing Corp.*, 546 F. Supp. 852, 856-57 & n.7 (D. Minn. 1982) (employer's obligation to contribute held to have permanently ceased approximately one

month after company permanently laid off all employees, since labor contract provided that contributions were to be made only for those employees who worked a minimum number of hours in any given month). However, the *duty to contribute* that arose from that agreement must terminate before an employer qualifies for the subsection (a)(1) exclusion.

Although Barbizon ceased to have an obligation under the applicable master agreement to contribute for the Provo plant after June 30, 1980, the Termination Agreement did not alter Barbizon's ongoing obligation to make payments for whatever contributory operations it continued to engage it. Thus, under the master agreement it remained bound to contribute on behalf of its employees at Montville, New Jersey, and with respect to work performed by outside contractors. Its unitary obligation to contribute did not cease; the operations for which it contributed were merely modified when it was relieved of any further obligation with respect to the Provo plant. Had Barbizon maintained an entirely separate collective bargaining agreement relating exclusively to Provo, rather than a master agreement covering multiple operations, we might have been persuaded to resolve this issue differently. But upon the facts presented, the requirements of subsection (a)(1) were not met.

B. *Subsection (a)(2)*

Barbizon next asserts that because the Provo plant was closed and all covered operations at that location ceased prior to September 26, 1980, it is therefore entitled to the "facility closing" exemption of subsection (a)(2). It further contends that under the June 24 Termination Agreement, its obligation to contribute to the Fund with

respect to work performed at Provo also ceased before the effective date of the MPPAA. In either event, it claims to be entitled to relief under subsection (a)(2).

Unless the Provo plant was a "facility" within the meaning of the statute, Barbizon is not entitled to the benefits of subsection (a)(2). Although the term is not defined in the statute itself or in any applicable regulations, some guidance is provided by the definition originally included in the bill that eventually became the MPPAA. That bill defined "facility" as "an economic unit, *generally* at a single physical location, where business is conducted or industrial operations are performed." H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 2, at 18 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 2993, 3007 (emphasis added). However, this definition was withdrawn before the bill was passed, so it is not controlling. Nevertheless, it is a useful starting point.

Lacking any clear statutory or administrative definition of "facility," we are entitled to look to the ordinary meaning of the term. *United Technologies Corp. v. OSHA*, 836 F.2d 52 (2d Cir. 1987). This approach has previously been used in order to construe the word "facility" in § 4217. *See United Mine Workers 1974 Pension Plan v. Williamson Shaft Constr. Co.*, 6 Employee Benefits Cas. (BNA) 1593, 1603 (Jan. 29, 1985) (Pritzker, Arb.); *see also May Stern & Co. v. Western Pennsylvania Teamsters & Empl. Pension Fund*, 8 Employee Benefits Cas. (BNA) 2205, 2215 (Apr. 16, 1987) (Nagle, Arb.). According to one standard definition, a "facility" is "something (as a hospital, machinery, plumbing) that is built, constructed, installed, or *established to perform some particular function* or facilitate some particular end." *Webster's Third New Int'l Dictionary* 812-13 (1981) (emphasis added). This definition is

consistent with the approach taken by Congress in the proposed definition described above and with the interpretation offered by the Pension Benefit Guaranty Corporation of the Department of Labor ("PBGC"), which is responsible for insuring multiemployer pension plans. *See* PBGC Op. Ltr. 86-2 (Jan. 31, 1986) (looking to "generally accepted economic terminology" and to "commonly used meaning" to interpret the term "facility" as "a discrete economic unit of an employer").

In most instances, as Barbizon argues, individual stores, warehouses, or centers of business operations will constitute separate facilities within the meaning of § 4217. *See, e.g., May Stern & Co.,* 8 Employee Benefits Cas. at 2215 (warehouse is facility); *Meatcutters Union Local 88 v. Del Monte Supermarkets,* 565 F. Supp. 27, 29 (E.D. Mo.) (individual stores in supermarket chain are facilities), *vacated on joint motion of parties,* 4 Employee Benefits Cas. (BNA) 2168 (8th Cir. 1983); *see also* PBGC Op. Ltr. 86-2, *supra* (same); PBGC Op. Ltr. 82-33 (Oct. 28, 1982) (same). However, the term is not meant to be applied mechanically to every physically separate structure, since it is intended to refer to a readily identifiable and discrete segment of the employer's business—what the PBGC called "a discrete economic unit." *See* PBGC Op. Ltr. 86-2, *supra.* Frequently, this business segment will correspond to a factory, plant or store.

Yet, the PBGC has consistently noted that "there may be circumstances in which the plan sponsor may determine that a shift in operations from one location to another constitutes a continuation of operations at a facility." PBGC Op. Ltr. 85-1 (Jan. 4, 1985); PBGC Op. Ltr. 82-33, *supra; see also* PBGC Op. Ltr. 85-22 (Aug. 3,

1982) (same, in context of § 4205, 29 U.S.C. § 1385). Indeed, this rationale has been applied to deny a § 4217 exemption to a company that closed a plant in one state and moved a few miles away into another state, without discontinuing any of its productive operations. *See Paperworkers Local 286 Pension Plan v. Kardon Indus.*, 6 Employee Benefits Cas. (BNA) 2398, 2408 (Apr. 8, 1985) (Nagle, Arb.); *cf. May Stern & Co.*, 8 Employee Benefits Cas. at 2215 (company qualified under § 4217 because "[t]here is no suggestion that the covered work performed at a closed facility was simply transferred to another facility"). This approach is consistent both with the proposed congressional definition of a "facility" as something that is only "generally" at a single location, and with the dictionary definition of the term, which examines the function or operation being performed.

The "facility" at issue herein consists of more than the Provo plant itself: it is that portion of Barbizon's business which was composed of the productive operations that were formerly performed by the workers at the Provo plant and that, after June 30, 1980, were performed by outside contractors. *See also Central Pennsylvania Teamsters Pension Fund v. Royal Swan Foods, Inc.*, No. 84-4163, slip op. at 7 (E.D. Pa. Sept. 19, 1985) ("the primary focus should be on the employer's business and the relationship of the 'facility' to that business;" looking to factors such as the type of work performed to determine whether operations at two physical locations were part of same facility). Although Barbizon closed its physical plant and terminated the employment of its Provo-based workers, it did not lose any productive capacity in the process. From a functional perspective, Barbizon's shift in manufacturing technique did not re-

move any productive operations from the coverage of the pension plan. *See Paperworkers Pension Plan,* 6 Employee Benefits Cas. at 2408. Its conduct did not involve the mere retention of a few employees for the purpose of winding down a business operation, *cf. Connors v. Economy Bld'g Sys., Inc.,* 651 F. Supp. 849, 853 (D.D.C. 1986); rather, it amounted to a continuation of the same business with a modified method of production. Consequently, we conclude that there was no permanent cessation of "covered operations" at the "facility."

Section 4217(a)(2) also requires the Provo contributions to be excluded from Barbizon's contribution base if there was a permanent cessation, prior to September 26, 1980, of the obligation to contribute for work performed at the Provo facility. Although Barbizon did benefit from a reduction in the amount of contributions that it paid to the Fund after closing the Provo plant, it does not deny that it continued to make contributions on behalf of the employees of at least some of the subcontractors that performed the work previously done by Barbizon's own employees at Provo. Indeed, as discussed *supra* in the context of subsection (a)(1) of the statute, Barbizon had a continuing obligation under the master collective bargaining agreement to make such contributions. Since the work produced by the subcontractors was the same as that formerly produced at Provo, it was the product of the same "facility." And since Barbizon had a duty to contribute to the Fund with respect to work performed by some of these subcontractors, there was no "permanent cessation of the obligation to contribute." Barbizon therefore does not qualify for the second part of the subsection (a)(2) exemption, either.

In short, we find that Barbizon had a unitary obligation to contribute to the Fund, which arose under the master collective bargaining agreement, and which was not terminated by the June 24, 1980 agreement negotiated with the Union regarding the closure of the Provo plant. Furthermore, there was no cessation of covered operations at the Provo facility because Barbizon experienced no reduction in its productive operations as a result of the plant closure, and since the work formerly performed at Provo continued to be performed, albeit by different means. And since Barbizon was contractually required to and did indeed make contributions with respect to some of this continued production, there was no permanent cessation of the obligation to contribute. Barbizon was therefore ineligible for any exclusion under § 4217, and the judgment of the district court is therefore affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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85 Civ. 8822 (EW)

THE BARBIZON CORPORATION,
Plaintiff,

-against-

ILGWU NATIONAL RETIREMENT FUND,
SOL C. CHAIKIN and JOSEPH MOORE,
Defendants.

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EDWARD WEINFELD, D.J.

Plaintiff, The Barbizon Corporation ("Barbizon"), moves for summary judgment in this action for declaratory judgment arising under the Employee Retirement Income Security Act (ERISA)[1] as amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA)[2] and the Deficit Reduction Act of 1984.[3] Defendants, the ILGWU National Retirement Fund ("the Fund") and its trustees, Sol C. Chaikin and Joseph Moore, assert a counterclaim for declaratory judgment and cross move for summary judgment. There being no genuine issue of material fact, the court finds summary judgment is appropriate and grants defendants' motion for the reasons stated herein.

BACKGROUND

Barbizon is a New York corporation engaged in the sale of finished garments. Barbizon, through its wholly owned subsidiary Barbizon of Utah, Inc., manufactured its finished garments at its plant in Provo, Utah.[4] The Provo factory produced over 90% of the garments sold by Barbizon.[5] On November 30, 1979, Barbizon informed its Provo employees that it planned to close the Provo plant.[6] The plant was in fact closed prior to September 26, 1980.[7]

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1. 29 U.S.C. § 1001 *et seq.*

2. Pub. L. No. 96-364, 94 Stat. 1208 (1980).

3. Pub. L. No. 98-369, 98 Stat. 494 (1984).

4. *See* Affidavit of Anthony B. Ritter, Aug. 21, 1986, at para. 2.

5. *See* Affidavit of Anthony B. Ritter, Aug. 13, 1986, at para. 16.

6. *See* Joint Pretrial Order, Stipulated Facts Not in Dispute [hereinafter Stipulation] at para. 32.

7. *See id.* at para. 34.

After the Provo plant closed, Barbizon switched to a system of garment production by outside contractors under which Barbizon supplied fabric to a contractor cutter who cut the fabric and shipped it to other contractors for final manufacture.[8] Barbizon continued to market the product lines it had formerly manufactured in Provo through a central inventory distribution facility that Barbizon established at its Pinebrook, New Jersey facility.[9] Barbizon did not change the trademarks or tradenames of any products or lines of products previously manufactured at the Provo plant, nor did it make any changes in the manner in which it marketed finished garments.[10]

Both before and after the closing of the Provo plant, Barbizon was a party to two successive master collective bargaining agreements with the International Ladies' Garment Workers' Union (ILGWU), one covering the period February 1, 1977 through January 31, 1980, and the other covering the period February 1, 1980 through January 31, 1983.[11] Under these collective bargaining agreements, Barbizon was required to make contributions to the defendant Fund on behalf of certain of its employees, including but not limited to employees at the Provo Plant.[12] Barbizon maintained a separate supplemental agreement with the ILGWU governing the Provo employees. When Barbizon

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8. *See id.* at para. 41. In the garment industry, one who has no direct means of production on premises and relies on outside contractors to produce goods is known as a "jobber." *See* Greenstein v. National Skirt & Sportswear Ass'n, Inc., 178 F. Supp. 681, 687 (S.D.N.Y. 1959), *appeal dismissed*, 274 F.2d 430 (2d Cir. 1960).

9. *See* Affidavit of Anthony B. Ritter, Aug. 13, 1986, at paras. 14-15. The Pinebrook facility was alternately known as the Montville facility. *See id.* at para. 5.

10. *See* Stipulation at paras. 44-45.

11. *See* Affidavit of Theodore Bernstein at para. 2.

12. *See id.* at para. 3.

decided to close the Provo plant, it negotiated and entered a separate supplemental agreement governing the closure.[13]

In January 1983, Barbizon permanently withdrew from the Fund's pension plan.[14] On June 17, 1983, the Fund demanded that Barbizon pay to the Fund the amount of $1,509,139 as withdrawal liability, payable in 55 quarterly installments.[15] Barbizon has made partial payment of the amount demanded under protest.[16] The parties agree that a substantial portion, if not all, of the withdrawal liability claimed by the Fund turns on the effect for liability purposes of Barbizon's termination of its operation in Provo.[17] Accordingly, Barbizon filed this action for declaratory judgment on the issue of its withdrawal liability attributable to the Provo plant.

DISCUSSION

The parties appear to agree that the basic issue in the case is whether Barbizon's closing of its Provo plant was a closing of a facility within the meaning of 29 U.S.C. § 1397(a)(2) and whether there was a permanent cessation of an obligation to contribute under Barbizon's collective bargaining agreement within the meaning of 29 U.S.C. § 1397(a)(1).

When originally enacted in 1974, ERISA created a system of pension benefit insurance administered by the

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13. *See* Complaint at paras. 21-22.

14. *See* Answer at para. 17; *see also* Stipulation at para. 42.

15. *See* Stipulation at para. 6; Exhibit 1 to Plaintiff's Motion for Summary Judgment.

16. *See* Stipulation at paras. 8-10.

17. *See* id. at para. 18.

Pension Benefit Guarantee Corporation (PBGC).[18] Prior to the enactment of MPPAA, when a multiemployer pension plan terminated and there were unfunded vested benefits, the PBGC assessed liability against employers who had participated in the plan within the past five years. This created an incentive for employers to withdraw from plans with unfunded benefits before they terminated. Such withdrawals weakened the plan, which increased the likelihood of termination, which increased the incentive to withdraw.[19]

Congress responded with MPPAA, which provides that an employer who withdraws from a plan must make annual payments to the plan to fund the employer's portion of the plan's unfunded vested benefits. This withdrawal liability is calculated in large part according to the employer's past contributions to the plan, including contributions made before the enactment of MPPAA.[20] Recognizing the potential unfairness of imposing liability retroactively for contributions made before MPPAA's passage, Congress created two exceptions to the general rules for calculating withdrawal liability: if an employer's obligation to contribute to a plan under a collective bargaining agreement ceased prior to MPPAA's enactment or if a facility closed prior to MPPAA's enactment, then Congress allowed the employer to exclude from the withdrawal liability calculation contributions

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18. *See* Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986).

19. *See* H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 1, at 51, 54-55, 60, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2919, 2922-23; 2928; *see generally* Connolly, 475 U.S. 211.

20. *See* H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 1, at 77-78, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2945-46.

attributable to that collective bargaining agreement or to work performed at that facility.[21]

There is no dispute that the Fund was a "multi-employer pension plan" as defined by 29 U.S.C. §1002 (37)(A),[22] or that Barbizon has withdrawn from the Fund,[23] or that "all covered operations permanently ceased" at the Provo plant prior to September 26, 1980.[24] The issue is whether the Provo plant was a "facility" within the meaning of the statute or alternately whether there was "a collective bargaining agreement for which there was a permanent cessation of the obligation to contribute" within the meaning of the statute.

Congress did not define the term "facility" in MPPAA. In an early draft of MPPAA, the House Ways and Means Committee defined "facility" to mean "an economic unit, generally at a single physical location, where business is conducted or industrial operations are

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21. For the purpose of determining the amount of unfunded vested benefits allocable to an employer for a partial or complete withdrawal from a plan which occurs after September 25, 1980, . . . the amount of contributions, and the number of contribution base units, of such employer properly allocable—

> (1) to work performed under a collective bargaining agreement for which there was a permanent cessation of the obligation to contribute before September 26, 1980, or
>
> (2) to work performed at a facility at which all covered operations permanently ceased before September 26, 1980, or for which there was a permanent cessation of the obligation to contribute before that date,

shall not be taken into account. 29 U.S.C. § 1397(a).

22. *See* Stipulation at para. 4.

23. *See id.* at para. 42.

24. *See id.* at paras. 34, 37.

performed."[25] However, this definition was dropped before the bill was enacted. The parties' attempts to ascribe meaning based on statements of members of the House and Senate fail since they shed little light on the issue and are statements made in context unrelated to the intended meaning of the term "facility."[26]

Barbizon would have the court interpret the term "facility" according to its "plain meaning" and conclude that a "facility" must be "located physically in space and time at a single location."[27] Barbizon finds support for its position in a case that holds that a branch of a chain of grocery stores is a facility within the meaning of the statute[28] and in opinions that hold that the term "facility" cannot mean all operations covered under a single collective bargaining agreement.[29]

These arguments miss the point of the Fund's claim, which is that shifting from one means of production to another should not excuse an employer from its liabilities to a pension plan. The Fund argues that shifting from direct production of garments in Provo to indirect

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25. H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 2, at 18 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 2992, 3007.

26. *See* Plaintiff's Memorandum in Support of its Motion for Summary Judgment at 22-23; Defendants' and Counterclaim Plaintiffs' Memorandum in Support of Motion for Summary Judgment at 14.

27. Plaintiff's Memorandum in Support of its Motion for Summary Judgment at para. 14.

28. *See* Meatcutters Union Local No. 88 v. Del Monte Supermarkets, 565 F. Supp. 27 (E.D. Mo.), *vacated on joint motion of parties*, 4 Employee Benefits Cas. (BNA) 2168 (8th Cir. 1983).

29. *See* Central Pennsylvania Teamsters Pension Fund v. Royal Swan Foods, Inc., No. 84-4163, slip op. (E.D. Pa. Sept. 19, 1985).

production of garments in New Jersey without any reduction in business is not the kind of facility closing that Congress intended to excuse from withdrawal liability.

When Congress enacted MPPAA, the purpose of the withdrawal liability exceptions was to alleviate unfairness in imposing liability retroactively. If a discrete obligation to contribute to a plan, through a particular collective bargaining agreement or for a particular factory or store, had terminated prior to MPPAA's enactment, Congress thought it unfair to impose liability on an employer based on the past obligation. Absent the termination of such a discrete obligation to contribute to a plan, Congress made it clear that employers could not escape liability. Congress explicitly disallowed exclusion from liability "if a principal purpose of any transaction is to evade or avoid liability."[30]

In view of the purposes of MPPAA and the withdrawal liability exclusions, the court concludes that Congress did not intend the term "facility" to be interpreted simplistically as a physical plant. The definition supplied by the House Ways and Means committee was "an economic unit, *generally* at a single physical location."[31] Although a facility will often consist of a single physical plant, Congress clearly contemplated exceptions. One such exception would be where a plant merely moved across the street without ceasing business in any way. Another exception would be where an employer closes one plant and opens

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30. 29 U.S.C. § 1392(c).

31. H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 2, at 18 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News, 2992, 3007 (emphasis added).

another because it has adopted a new method of production in order to escape responsibilities to employees.

The PBGC, the agency Congress created to administer the provisions of ERISA and MPPAA, has similarly concluded that although a facility will ordinarily mean a single physical location, "there may be circumstances under which the plan sponsor will determine that a shift of operations from one location to another constitutes a continuation of operations at the facility."[32] In addition, Arbitrator Robert E. Nagle, who was formerly Executive Director of the PBGC, also concluded that shifting operations from a plant in Philadelphia to a plant in New Jersey did not constitute the closing of a facility within the meaning of the statute.[33]

The garment industry has a unique history of shifting from direct production to indirect jobber status in order to avoid obligations to employees. In *Greenstein v. National Skirt & Sportswear Ass'n*,[34] this court discussed the nature of employment relationships in the garment industry. The system of manufacturing garments by outside contractors developed as a way to avoid workers' demands for better pay and working conditions at the turn of the century. Because the jobber had no direct dealings with employees, it was not responsible to them for wages or working conditions. The unions, as well as enlightened leaders in the industry, sought to correct the demoralizing effects upon employees brought about by the jobber-con-

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32. PBGC opinion letter No. 82-22 (Aug. 3, 1982); *see also* PBGC opinion letter No. 82-33 (Oct. 28, 1982).

33. *See* Paperworkers Local 286 Pension Plan and Kardon Industries, Inc., 6 Employee Benefits Cas. (BNA) 2398, 2408 (Apr. 8, 1985) (Nagle, Arb.).

34. 178 F. Supp. 681 (S.D.N.Y. 1959) (Weinfeld, J.), *appeal dismissed*, 274 F.2d 430 (2d Cir. 1960).

tractor system. Collective bargaining agreements through the years have reflected not only a purpose to correct these conditions, but to prevent their recurrence.[35]

In light of this history, several courts have held that a jobber should be considered the employer of its contractors' employees.[36] Accordingly, in Barbizon's case, shifting to jobber status was no more than a continuation of the same business Barbizon had conducted in Provo. Closing the Provo plant and opening another in New Jersey to carry on the same business, was equivalent to the transaction at issue in *Paperworkers Local 286 Pension Plan and Kardon Industries, Inc.*[37] That transaction did not qualify as the closing of a facility within the meaning of MPPAA.

This interpretation of the term "facility" is consistent with other case law. In *Meatcutters Union Local No. 88 v. Del Monte Supermarkets*,[38] the court held that where an employer who owned four supermarkets closed two stores and did not open another for several years, there was a facility closing, even though all the stores operated under the same collective bargaining agreement. *Del Monte* differs from the case at bar because in *Del Monte* there was no evidence that the employer shifted its business from one location to another. In *Central Pennsylvania Teamsters Pension Fund v. Royal Swan Foods*, the court, in finding that one of two separate facilities had closed, relied on the fact that "[t]here was no significant shift of

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35. *Id.* at 687-688.

36. *See* ILGWU National Retirement Fund v. Distinctive Coat Co., No. 84-1758, slip op. at 10 (S.D.N.Y. Nov. 20, 1985); Abeles v. Friedman, 171 Misc. 1042, 14 N.Y.S.2d 252 (1939).

37. 6 Employee Benefits Cas. (BNA) 2398 (Apr. 8, 1985).

38. 565 F. Supp. 27 (E.D. Mo.), *vacated on joint motion of parties*, 4 Employee Benefits Cas. (BNA) 2168 (8th Cir. 1983).

the Berwick operation to Hazelton after the former location closed."[39]

In deciding whether there has been a closing of a facility for purposes of § 1397(a)(2), courts should consider all the circumstances: whether a new plant has opened in the same line of business, whether the new plant continues to serve the same customers, whether the employer continues to use the same employees and equipment, whether the volume of business remains the same or has increased, and whether the employer's obligations to contribute under the plan remain the same. Where as here it appears that the employer has shifted its business to a new location with the same productive capacity, there is no facility closing as required under § 1397(a)(2). While in a literal sense Barbizon closed a facility, in fact it merely shifted the site of its operations.

Barbizon also argues that it should be relieved of withdrawal liability under § 1397(a)(1) because there was a permanent cessation of its obligation to contribute to the plan under a collective bargaining agreement. The collective bargaining agreement upon which Barbizon relies is the supplemental agreement entered with the ILGWU on June 24, 1980. Because that agreement terminated six days later on June 30, 1980, before the enactment of MPPAA, Barbizon argues that there was a permanent cessation of an obligation to contribute within the meaning of the statute.

The June 24th agreement that Barbizon relies on governed the closing of the Provo plant and specified such things as how vacation pay would be awarded to the terminated employees. The supplemental agreement

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39. No. 84-4163, slip op. at 8, n.2 (E.D. Pa. Sept. 19, 1985).

specifies that Barbizon "shall continue to be liable for the contributions required to be made to the union benefit funds pursuant to the collective bargaining agreement for the period up to June 30, 1980."[40] The collective bargaining agreement referred to in the June 24th agreement is the master agreement, in effect from February 1, 1980 through January 31, 1983.[41]

Section 1397(a)(1) applies to "a collective bargaining agreement for which there was a permanent cessation of the obligation to contribute before September 26, 1980." In order for there to be a permanent cessation of an obligation to contribute under a collective bargaining agreement, the collective bargaining agreement must give rise to an obligation. Accordingly, § 1397(a)(1) only applies to collective bargaining agreements which establish an obligation to contribute.

The court concludes that, for purposes of § 1397(a)(1), the agreement under which the obligation to contribute arose is the master collective bargaining agreement in effect from February 1, 1980 through January 31, 1983. Under that agreement there was not a permanent cessation of the obligation to contribute to the Fund before September 26, 1980. Barbizon is therefore not entitled to reduce its withdrawal liability pursuant to § 1397(a)(1).

Barbizon also asks the court to stay its obligation to contribute to the Fund pending final resolution of this dispute, to order discovery of the Fund, and to award

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40. Exhibit 14 to Plaintiff's Motion for Summary Judgment at 6.

41. Exhibit 31 to Plaintiff's Motion for Summary Judgment.

Barbizon exemplary damages, costs, and attorneys fees for the Fund's "willful or flagrant violation of a clear duty to Barbizon." In view of the court's determination of the parties' motions for summary judgment, plaintiff's motion to stay its obligation to contribute to the fund is denied. Any issues remaining about the amount of Barbizon's withdrawal liability are to be submitted to an arbitrator pursuant to 29 U.S.C. § 1401, including discovery issues. As for the request for exemplary damages, costs, and attorneys fees, that request is so lacking in substance that it does not merit discussion.

So ordered.

Date: August 10, 1987
New York, New York

/s/ Edward Weinfeld
United States District Judge

APPENDIX C

(Filed June 2, 1988)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 2nd day of June one thousand nine hundred and eighty-eight.

No. 87-7777

THE BARBIZON CORPORATION,
Plaintiff-Appellant,

v.

ILGWU NATIONAL RETIREMENT FUND, SOL C. CHAIKIN and JOSEPH MOORE,
Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, The Barbizon Corporation,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Elaine B. Goldsmith,
Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85 Civ. 8822 (EW)

THE BARBIZON CORPORATION,
Plaintiff,

v.

ILGWU NATIONAL RETIREMENT FUND, SOL C. CHAIKIN, AND JOSEPH MOORE,
Defendants.

JOINT PRE-TRIAL ORDER

STIPULATED FACTS NOT IN DISPUTE

1. This action arises under the Employee Retirement Income Security Act of 1974, PL 93-406 (ERISA), as amended by the Multiemployer Pension Plan Amendments Act of 1980, PL 96-364 (MPPAA) and the Deficit Reduction Act of 1984, Division A, PL 98-369 (DEFRA), 29 USC §§1381, 1385 note, 1391, 1397, 1399, 1415 and 1461. (Complaint ¶1; Answer ¶1)

2. This is an action for a declaratory judgment pursuant to 28 USC §2201, for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears. (Complaint ¶2; F.R.Civ.P. 41(a)(1) Stipulation and Answer ¶2)

3. Plaintiff, The Barbizon Corporation, (Barbizon), is a New York corporation with its principal place of business at 475 Fifth Avenue, New York, New York. (Answer/Counterclaim ¶14; Reply ¶3)

4. The defendant ILGWU National Retirement Fund (Fund) is a "pension plan," and "employee pension benefit plan" and a "multiemployer plan" within the meaning of those terms as defined by ERISA §§3(2)(37), 29 USC §§1002(2)(37), with its principal place of business at 218 West 40th Street, New York, New York. (Complaint ¶4; Answer ¶4)

5. Defendants Sol C. Chaikin and Joseph Moore are trustees of the Fund. (Complaint ¶5; Answer ¶4)

6. On June 17, 1983, the Fund demanded that Barbizon pay to the Fund the amount of $1,509,139 as withdrawal liability. Exhibit I is in all relevant respects a true copy of the Fund's demand and is incorporated herein by reference. (Complaint ¶6; Answer ¶4)

7. Barbizon disputes this assessment for the reasons set forth more fully herein and claims that it owes no withdrawal liability to the Fund. (Complaint ¶7; Answer ¶4)

8. On or about April 12, 1984, Barbizon remitted $127,842 under protest to the Fund as payment for the installments the Fund claimed to be due on August 20, 1983, November 20, 1983 and February 20, 1984. (Complaint ¶8; Answer ¶4)

9. The Fund has demanded, but Barbizon has not paid, $5,294.53 which the Fund claims is interest due on the first three installments through and including April 21, 1984. (Complaint ¶9; Answer ¶4)

10. Barbizon, under protest, has paid to the Fund each of the remaining installments through the present. (Complaint ¶10; Answer ¶4)

11. Barbizon requested a review of the basis of the Fund's demand for payment. Exhibit 2 is in all relevant respects a true copy of Barbizon's letter and is incorporated herein by reference. (Complaint ¶11; Answer ¶4)

12. On or about December 8, 1983, the Fund responded to Barbizon's request for a review but did not alter or change its demand for payment. Exhibit 3 is in all relevant respects a true copy of the Fund's letter and is incorporated herein by reference. (Complaint ¶12; Answer ¶4)

13. Barbizon demanded arbitration of the disputed amount of alleged withdrawal liability on February 1, 1984. Exhibit 4 is in all relevant respects a true copy of Barbizon's letter and is incorporated herein by reference. Barbizon's demand for arbitration was timely and the Fund acknowledged the timeliness of the demand in the stipulation of dismissal in 84 Civ. 2011 (EW), a case previously before this court. (Complaint ¶13; Answer ¶4)

14. In a letter dated September 18, 1984, Barbizon again demanded arbitration of the parties' dispute over the basis for the Fund's demand for payment and, furthermore, asked the Fund to reconsider the basis for the demand in light of DEFRA §558 and the settlement reached in Civil Action File No. 83 Civ. 8052 (EW), a case previously before this court. Exhibit 5 is in all relevant respects a true copy of Barbizon's letter and is incorporated herein by reference. (Complaint ¶14; Answer ¶5 and Defendants' Response to Requests for Admissions of Facts and Documents, No. 2, subpart a.)

15. The Fund sent a letter dated December 11, 1984 to counsel for Barbizon. Exhibit 6 is in all relevant respects a true copy of the Fund's letter and is incorporated

herein by reference. (Complaint ¶15; Answer ¶6 and Defendants' Response to Requests for Admissions of Facts and Documents, No. 2, subpart b.)

16. On February 6, 1985, Barbizon again demanded arbitration of the disputed assessment of withdrawal liability. Exhibit 7 is in all relevant respects a true copy of Barbizon's letter and is incorporated herein by reference. (Complaint ¶16; Answer ¶7 and Defendants' Response to Requests for Admissions of Facts and Documents, No. 2, subpart c.)

17. The parties have not selected an arbitrator to arbitrate the dispute described in Barbizon's complaint and attached exhibits nor agreed upon the rules for such an arbitration. (Complaint ¶16; Answer ¶4)

18. A substantial portion, if not all, of the withdrawal liability claimed by Fund turns on the effect for liability purposes of Barbizon's termination of its operation in Provo, Utah. (Complaint ¶18; Answer 8 and the Fund's answers to Barbizon's Interrogatories 24 and 25.)

19. Barbizon closed its Provo, Utah establishment prior to September 26, 1980. (Complaint ¶19; Defendant's Response to Requests for Admissions of Facts and Documents, No. 3, subparts a, c, d, h, i, k, l, m, n, o, and p.)

20. Barbizon maintained a separate supplemental agreement with the International Ladies Garment Workers Union (ILGWU) for Barbizon's Provo, Utah, ILGWU represented employees. (Complaint ¶21; Answer ¶4)

21. Exhibit 15 is in all relevant respects a true copy of the supplemental agreement covering ILGWU represented employees in Provo; Exhibit 16 is in all relevant respects a true copy of the supplemental agreement cov-

ering ILGWU represented employees in Montville, New Jersey. (this stipulation)

22. Barbizon and the ILGWU negotiated and entered into a separate agreement covering the closure of Barbizon's Provo, Utah factory. Exhibit 14 is in all relevant respects a true copy of said separate agreement. (Complaint ¶22; Answer ¶4 and Defendants' Response to Plaintiff's Second Request to Defendants for Admissions of Facts and Documents, No. 1(b).)

23. Plan documents under which the Fund operates and the collective bargaining agreements between the ILGWU and Barbizon, do not define the term "facility" for withdrawal liability or for any other purpose. (Complaint ¶23; Answer ¶4)

24. The separate agreement covering the closure of Barbizon's Provo factory was entered into between the ILGWU and Barbizon by their respective attorneys on June 24, 1980, and provided that Barbizon's obligation to contribute on behalf of work performed by ILGWU represented employees at Provo would expire on June 30, 1980. See Exhibit 14. (Defendants' Response to Plaintiff's Second Request to Defendants for Admissions of Facts and Documents, No. 1(b).)

25. Exhibit 12 is a copy, true in all relevant respects, of the letter dated November 12, 1980, written by defendant Sol C. Chaikin, to the editor of the *New York Times*, and published in the *New York Times* on Monday, November 17, 1980. (Defendants' Response to Request for Admissions of Facts and Documents No. 1 (e).)

26. The Fund received a letter in the form of Exhibit 5 at or about September 18, 1984, which is the

letter to which the defendants refer in their answer, paragraph 5. (Defendants' Response to Requests for Admissions of Facts and Documents No. 2, subpart a.)

27. Exhibit 6 is a copy of a letter, true in all relevant respects, dated December 11, 1984 from the ILGWU National Retirement Fund to Barbizon, and to which the defendants refer in their answer, paragraph 6. (Defendants' Response to Requests for Admissions of Facts and Documents No. 2, subpart b.)

28. Exhibit 7 is a letter dated February 6, 1985 from Barbizon to the ILGWU National Retirement Fund, and to which the defendants refer in their answer, paragraph 7. (Defendants' Response to Requests for Admissions of Facts and Documents No. 2, subpart c.)

29. Barbizon's Provo, Utah plant closed prior to defendants' Sol C. Chaikin's meeting with Professor Woodworth in August, 1980 which meeting Sol C. Chaikin mentioned in his November 12, 1980 letter to the editor of the *New York Times*. (Defendants' Response to Requests for Admissions of Facts and Documents No. 3, subpart a.)

30. Defendant Sol C. Chaikin used the word "facility" to describe Barbizon's Provo, Utah plant in the November 12, 1980 letter which he wrote to the editor of the *New York Times*. (Defendants' Response to Requests for Admissions of Facts and Documents, No. 3, subpart b.)

31. Defendant Sol C. Chaikin implied that Barbizon closed its Provo, Utah plant prior to September 26, 1980 when he wrote in his November 12, 1980 letter to the editor of the New York Times that he met with Pro-

fessor Woodworth "in August." (Defendants' Response to Requests for Admissions of Facts and Documents, No. 3, subpart c.)

32. Barbizon announced to its Provo, Utah ILGWU represented employees on November 30, 1979 that Barbizon would close down its Provo, Utah plant on January 31, 1980. (Defendants' Response to Requests for Admissions of Facts and Documents, No. 3, subpart d.)

33. Barbizon representatives met with ILGWU representatives on March 14, 1980 to discuss closing Barbizon's Provo, Utah plant. (Defendants' Response to Requests for Admissions of Facts and Documents, No. 3, subpart e.)

34. Barbizon closed its Provo, Utah plant prior to September 26, 1980. (Defendants' Response to Requests for Admissions of Facts and Documents, No. 3, subpart k.)

35. Production and other operations requiring the services of ILGWU represented bargaining unit employees at Barbizon's Provo, Utah plant ceased prior to September 26, 1980. (Defendants' Response to Requests for Admissions of Facts and Documents, No. 3, subpart 1.)

36. Barbizon's obligation to make contributions under a collective bargaining agreement to the Fund on behalf of employees located at plaintiff's Provo, Utah plant ceased prior to September 26, 1980. (Defendants' Response to Requests for Admissions of Facts and Documents, No. 3, subpart m.)

37. Barbizon ceased all production in its Provo, Utah plant prior to September 26, 1980. (Defendants' Response to Requests for Admissions of Facts and Documents, No. 3, subpart n.)

38. Barbizon's operations at its Provo, Utah plant, which were covered by collective bargaining agreements with the ILGWU, ceased prior to September 26, 1980. (Defendants' Response to Requests for Admissions of Facts and Documents, No. 3, subpart o.)

39. Exhibit 13 is a copy, true in all relevant respects, of the letter from the ILGWU National Retirement Fund, dated August 18, 1982, and addressed and sent to Barbizon's attorney, James W. Wimberly, Jr. (Defendants' Response to Plaintiff's Second Request to Defendants for Admissions of Facts and Documents, No. 1(a).)

40. Exhibit 14, includes copies, true in all relevant respects, of letters dated June 20, 1980 and June 13, 1980 between counsel for the ILGWU and counsel for Barbizon. Exhibit 14 also includes a copy, true in all relevant respects, of the relevant portion of the agreement between Barbizon and the ILGWU regarding the closure of plaintiff's plant in Provo, Utah. (Defendants' Response to Requests for Admissions of Facts and Documents, No. 1(b).)

41. Following the closure of the Provo plant in 1980, Barbizon switched to a system of production by outside contractors under which Barbizon supplies fabric to a contractor cutter who cuts the fabric and ships it to other contractors for final manufacture.

42. Barbizon has withdrawn from the Fund within the meaning of MPPAA.

43. During the period 1979 through 1982, Barbizon's gross sales were as follows:

1979	$26,417,682
1980	$28,669,579
1981	$29,097,936
1982	$33,843,422

44. Barbizon did not change the trademarks or tradenames of any products or lines of products or discontinue any products or lines of products previously manufactured at the Provo plant as a result of the closure of that plant.

45. Barbizon did not make any changes with respect to the manner in which it marketed finished garments as a result of the closing of the Provo plant.

46. Barbizon sold or lent some of the specially designed equipment from the Provo plant to its outside contractors following the closure of that plant.

APPENDIX E

State of New York :
: SS
County of ..... :

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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85 Civ. 8822 (EW)

THE BARBIZON CORPORATION,
Plaintiff,

v.

ILGWU NATIONAL RETIREMENT FUND,
SOL C. CHAIKIN, and JOSEPH MOORE,
Defendants.

AFFIDAVIT

(Anthony B. Ritter)

AFFIDAVIT

Anthony B. Ritter, being duly sworn, states as follows:

1. Barbizon of Utah, Inc. is a wholly owned subsidiary of The Barbizon Corporation. The Barbizon Corporation was incorporated in New York in 1939. Barbizon of Utah, Inc. was incorporated in Delaware and qualified to do business in Utah in 1946 under the name "General Dry Goods Co, Inc." The corporate name was changed from "General Dry Goods Co, Inc." to "Barbizon of Utah, Inc." in 1948.

2. The Barbizon Corporation hired me as a trainee in June 1951. Thereafter I served as a salesman, an assistant sales manager, a sales manager, a sales manager-secretary, and a vice-president, until, in 1971, I was promoted to Executive Vice-President. I became and have remained President of The Barbizon Corporation since December 1979. I have personal knowledge of the matters hereinafter referred to and make this affidavit in support of Plaintiff's motion for summary judgment.

3. During the five year period ending on September 25, 1980, Barbizon of Utah, Inc. owned and operated only one garment manufacturing facility, namely, its facility in Provo, Utah. During the same period The Barbizon Corporation and its subsidiaries did not own or operate a garment manufacturing facility, except the facility in Provo, Utah.

4. Barbizon of Utah, Inc. closed its Provo manufacturing facility for economic reasons, including high labor costs, excessive turnover and training costs, excessive transportation costs due to the location of the Provo facility, and the lack of a West Coast market.

5. At the beginning of 1980, The Barbizon Corporation and its subsidiaries owned or operated several facilities including:

(A) Parkfield Realty:

A building, owned by Parkfield Realty, of about 60,000 square feet in Pinebrook, New Jersey, (sometimes referred to as "Montville") and used as follows:

(1) office functions, which employed about 60 persons in about 10,000 square feet of office space; and,

(2) a distribution center of about 50,000 square feet of warehouse, shipping and receiving space which employed about 63 persons.

(B) Barbizon of Utah, Inc.:

(1) The manufacturing facility in Provo, Utah, owned by Barbizon of Utah, Inc., consisting of about 60,000 square feet and employing over three hundred persons.

(2) Two retail outlets in Utah, one located in Sandy, Utah and the other in Provo, both of which sold fabric, seconds, irregulars, mark-downs, over-orders, etc. Barbizon of Utah, Inc. located the Provo store in a shopping center where it occupied about 2,000 square feet. Barbizon of Utah, Inc. located the second retail store in a suburb of Salt Lake City called Sandy. Provo and Sandy are about 20 miles apart and the shopping center store is several miles from the Provo manufacturing facility.

(C) The Barbizon Corporation:

Executive offices located in New York City, New York consisting of about 12,000 square feet and employing about 45 persons and leased by The Barbizon Corporation.

(D) Jaunty Textiles:

A weaving facility located in Scranton Pennsylvania, comprising about 200,000 square feet and employing about 260 persons in the manufacture of textiles for use by Barbizon

and by others and owned by Jaunty Textiles.

(E) Barbizon Lingerie Corp.:

Several retail stores devoted to selling excess Barbizon merchandise including irregulars, mark-downs, over-orders, seconds, and fabric. The space for each store is about 2,000 square feet, and each is leased by Barbizon Lingerie Corp.

6. The Barbizon Corporation and its subsidiaries are separate economic units for which separate state income tax returns are filed. Accounting and bookkeeping services for each subsidiary corporation are physically separate.

7. Barbizon of Utah, Inc. maintained its own and separate payroll, bookkeeping and bank accounts. Barbizon of Utah, Inc. maintained its own legal counsel in Salt Lake City.

8. Barbizon of Utah, Inc. owned the real estate upon which its Provo manufacturing facility was located and sold it in 1980.

9. Barbizon of Utah, Inc. did not transfer employees or supervisors between its manufacturing facility and retail stores.

10. The Barbizon Corporation and the ILGWU both considered the Provo manufacturing plant to be a separate bargaining unit and negotiated terms of employment for ILGWU represented employees in Pinebrook which were different from the terms of employment for ILGWU represented employees at Barbizon of Utah, Inc. in Provo. The ILGWU and The Barbizon Corporation recognized that

Barbizon of Utah, Inc. was a separate and distinct legal entity and so the Provo supplemental agreement included Barbizon of Utah, Inc. as a party but the Pinebrook supplement did not. Holidays and medical benefits for ILGWU represented employees in Pinebrook were different from the holidays and medical benefits for ILGWU represented employees in Provo. Hours of work and breaks were also different as were rates of pay.

11. Barbizon of Utah, Inc. sold about two-thirds of the manufacturing equipment used at its Provo facility to a West Coast buyer with whom The Barbizon Corporation and its subsidiaries have had no dealings since. Barbizon kept some specialized equipment to sell, lease, or lend and stored the rest in New Jersey at its Pinebrook facility.

12. When Barbizon of Utah, Inc. closed its Provo manufacturing facility, The Barbizon Corporation had on hand sufficient inventory to reduce its immediate need for finished products.

13. Provo, Utah is more than 1,000 miles from the nearest independent contractor with whom The Barbizon Corporation, or any of its subsidiaries, contracted for the manufacture of garments.

14. Before the Provo facility closed, finished goods were shipped from Provo to the Pinebrook Distribution facility using trucks owned or leased by The Barbizon Corporation or its subsidiaries. After closing Provo, air and ground common carriers were used to ship goods to and from various independent contractors.

15. The use of suppliers were changed as a result of closing the Provo facility. Office supplies, machinery, parts, bags, hangers, cartons, threads, and other supplies

were purchased from West Coast suppliers while Provo was open; but after its closure, supplies were purchased from East Coast suppliers. Also, after the Provo manufacturing facility closed, a central inventory distribution facility was established at the Montville plant. Necessary supplies were first shipped to the Montville distribution facility where, in turn, the supplies were shipped to various independent contractors. These supplies included, in addition to the supplies previously mentioned, all raw material, such as trim, other than fabric.

16. Major changes occurred in the manufacture of garments as a result of closing the Provo facility. While open, the Provo factory produced over 90% of the garments sold by The Barbizon Corporation. Except for surplus inventory, as a result of closing Provo, The Barbizon Corporation obtained 100% of its garment inventory from independent contractors, for it had no productive capacity of its own.

17. After closing Provo, field representatives visited the independent contractors to check on production schedules and quality. At the Provo factory, hourly-paid in-line inspectors, who were part of the bargaining unit, carried out the quality control function.

18. Without its Provo facility, Barbizon shipped fabric to an independent contract cutter who in turn shipped the cut fabric to other independent contractors to complete the manufacture.

19. When Provo was open, personnel, payroll and bookkeeping records were kept by Barbizon of Utah, Inc. in Provo. The Barbizon Corporation does not maintain personnel, payroll or bookkeeping records for any independent contractors.

20. When Provo was open, hiring, discharge, discipline, promotions, lay-off, etc., were handled in Provo by the Provo management. The Barbizon Corporation has no control over independent contractors' hiring, discharge, discipline, promotion, lay-off, etc., policies or actions. The Barbizon Corporation does not have any control over the employees of its independent contractors.

21. Barbizon of Utah, Inc. owned the Provo factory. Neither The Barbizon Corporation nor any of its subsidiaries had either partial or complete ownership of any of the domestic independent contractors with whom Barbizon contracted for manufacture of its products subsequent to closing the Provo factory.

22. No production, supervisory or management employees of Barbizon of Utah, Inc. transferred from the Provo factory to the employment of any independent contractor with whom The Barbizon Corporation has contracted.

23. Barbizon has no control over the working conditions, hours, wages, shifts, benefits, seniority, or promotions, of the employees in any of the manufacturing facilities owned or operated by independent contractors with whom Barbizon contracts for the manufacture of garments.

/s/ Anthony B. Ritter
Anthony B. Ritter

Sworn to and subscribed before me this 13th day of August, 1986.

/s/ Sebastian Alongi
Notary Public

(Seal)

Sebastian Alongi
Notary Public of New Jersey

My commission expires Oct. 21, 1987.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85 Civ. 8822 (EW)

THE BARBIZON CORPORATION,
Plaintiff,

v.

ILGWU NATIONAL RETIREMENT FUND, SOL C. CHAIKIN AND JOSEPH MOORE,
Defendants.

AFFIDAVIT

(Anthony B. Ritter)

Anthony B. Ritter, being duly sworn, states:

1. I am President of The Barbizon Corporation (Barbizon), I have personal knowledge of the matters set forth below, and I make this supplemental affidavit in support of Barbizon's motion for summary judgment.

2. Barbizon was, during the two years before and after the Provo facility closed, engaged in the business of the design and wholesale of finished garments. Barbizon did not itself manufacture garments for wholesale. Barbizon of Utah, Inc., a wholly owned subsidiary of Barbizon was engaged, while the Provo facility was open, primarily in the manufacture of finished garments for Barbizon. After closing the Provo facility, Barbizon of Utah, Inc.'s business consisted primarily of the retail of some of Barbizon's products. Barbizon and Barbizon

of Utah, Inc. were thus engaged in two different lines of business.

3. The nature of Barbizon's business changed drastically after the Provo facility closed because Barbizon lost control of several essential factors affecting its profitability, thereby substantially altering its economic foundation. Each independent contractor made its own unique demands upon Barbizon and required separately negotiated contracts covering pricing, quality, quantity and delivery dates. Each new season brought substantial changes to Barbizon's business because Barbizon had no assurances that an independent contractor would or could perform the manufacturing Barbizon required to meet its commitments to retailers for pricing, delivery, quantity, and quality of finished garments. In other words, Barbizon assumed a risk wholly unknown to Barbizon during the years when Provo was in operation.

4. The gross sales listed in Stipulated Fact 43 in the pre-trial order includes gross sales by Barbizon and its subsidiaries, including wholesale and retail sales of garments and fabrics.

/s/ Anthony B. Ritter
Anthony B. Ritter

Sworn to and subscribed before me this 21st day of Aug., 1986.

/s/ Enrico P. Albanesi
Notary Public

Enrico P. Albanesi, Notary Public
Scranton, Lackawanna County

My Commission Expires Aug. 21, 1989
Member, Pennsylvania Association of Notaries

APPENDIX G

State of Pennsylvania :
: SS
County of Lackawanna :

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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85 Civ. 8822 (EW)

THE BARBIZON CORPORATION,
Plaintiff,

v.

ILGWU NATIONAL RETIREMENT FUND,
SOL C. CHAIKIN, and JOSEPH MOORE,
Defendants.

AFFIDAVIT

(David Kerr)

David W. Kerr, being duly sworn, states as follows:

1. I helped close down the Provo manufacturing facility of Barbizon of Utah, Inc. I am familiar with the manufacturing equipment in Provo and was present when it was packaged and sent to various destinations. I have personal knowledge of the matters mentioned below and make this affidavit to support The Barbizon Corporation's Motion for Summary Judgment.

2. Barbizon of Utah, Inc. sold about 65% of its approximately 450 machines outright to a west coast dealer.

3. Barbizon of Utah, Inc. stored about 70 machines at its Montville, New Jersey facility.

/s/ David W. Kerr
David W. Kerr

Sworn to and subscribed before me this 21 day of August, 1986.

/s/ Irma Zenke
Notary Public

Irma Zenke, Notary Public
Scranton, Lackawanna County, Pa.

My Commission Expires February 27, 1988

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85 Civ. 8822 (EW)

THE BARBIZON CORPORATION,
Plaintiff,

v.

ILGWU NATIONAL RETIREMENT FUND,
SOL C. CHAIKIN, and JOSEPH MOORE,
Defendants.

AFFIDAVIT

(Richard Van Genderen)

STATE OF UTAH
COUNTY OF UTAH

Richard Van Genderen, being duly sworn, states as follows:

1. I helped close down the Provo manufacturing facility of Barbizon of Utah, Inc. I was a consultant to Tom Jernigan, Provo plant manager, at the time the Provo factory was closed. I have personal knowledge of the matters mentioned below and make this affidavit to support The Barbizon Corporation's Motion for Summary Judgment.

2. The Provo factory was completely shut down for production purposes before July 1, 1980.

/s/ Richard Van Genderen
Richard Van Genderen

Sworn to and subscribed before me this 10th day of Sept., 1986.

/s/ Gerald Gilmer
Notary Public

APPENDIX I

ILGWU NATIONAL RETIREMENT FUND
218 West 40th St., New York, N.Y. 10018
(212) 398-3870

CERTIFIED NO. 871426

June 17, 1983

Barbizon Corporation
475 Fifth Avenue
New York, New York 10017

Re: Withdrawal Liability
Barbizon Corporation

Gentlemen:

We have been informed that as of 1983, Barbizon Corporation (Barbizon) has completely withdrawn from the ILGWU National Retirement Fund (the Fund).

Pursuant to section 4202 of the Employee Retirement Income Act of 1974 (ERISA) as amended by the Multiemployer Pension Plan Amendments Act of 1980 (the Act), this letter constitutes the notice that such a withdrawal creates a liability to the Fund.

By application of the formula described in section 4211 (b) of ERISA, we have computed Barbizon's liability to the Fund to be in the amount of $1,509,139. This calculation is based on our records which show that Barbizon was obligated to contribute a total of $707,543 for the period 1975 through 1979, $687,846 for the period 1976 through 1980 and $612,682 for the period 1977 through 1981.

Under section 4219(c), this liability is payable over 13.6128899 years at the rate of $42,614 per quarter. For these purposes quarterly due dates have been determined to be the 20th day of August, November, February and May. The final or 55th payment in the amount of $19,242.76 will be due on February 20, 1997.

Based on the foregoing, demand is made herewith for the first of such quarterly payments in the amount of $42,614.

The above stated liability and payment schedule is subject to possible adjustments in that any actuarial changes in the amount of unfunded vested benefits, or a redetermination of Barbizon's obligation to contribute to the Fund, may affect Barbizon's withdrawal liability to the Fund. Immediately following any such change, an amended liability statement will be submitted to you.

Under section 4219(b)(2)(A) Barbizon has the right within 90 days after receipt of this demand to:

1. Ask the undersigned to review any specific matter relating to the determination of the withdrawal liability and schedule of payment;
2. Identify any inaccuracy in the determination of the unfunded vested benefits allocable to Barbizon; and
3. Furnish any additional relevant information.

In particular, your liability might be eliminated if you are contributing to the Fund through an affiliated company or corporation. Any such matter raised by you will be reviewed by the Fund. After such review, the Fund will notify you of its decision and the basis there-

fore. Should the Fund determine that a change in liability, or any amount thereof exists, you will be advised of such a determination including any change in the schedule of payments.

Pursuant to ERISA section 4221 any dispute arising out of the Fund's determination and review must be resolved through arbitration. Either party may initiate the arbitration proceeding herein within a 60 day period after the earlier of

(A) The date of the Fund's notice of findings and determination after any review, or

(B) 120 days after the date of Barbizon's request under section 4219(b)(2) of ERISA.

Notwithstanding any request of review, arbitration or possible future adjustments, however, payments demanded herein must commence in accordance with the terms and schedule set forth above, ERISA section 4219(c)(2).

Payment should be made directly to the order of the ILGWU National Retirement Fund and forwarded to the letterhead address.

Very truly yours,

Theodore Bernstein, Director

/s/ Bert N. Obrentz
By: Bert N. Obrentz

BNO:r

enclosure

cc: Western States Region
New Jersey Region
Northeast Department

ESTIMATED EMPLOYER WITHDRAWAL LIABILITY

Through Plan Year 1981

1.	Contributions required to be made by Barbizon Corporation for years 1975 - 1979 (Excluding any delinquent amounts due to the Fund)	$ 707,543
2.	Contributions made to the ILGWU National Retirement Fund by all employers for the years 1975 - 1979	$449,736,351
3.	Unamortized amount as of December 31, 1981 of the unfunded present value of vested benefits for withdrawal liability purposes determined as of December 31, 1979	$799,123,100
4.	Barbizon Corporation's allocated share of item (3): (1) x (3) divided by (2)	$ 1,257,212
5.	Contributions required to be made by Barbizon Corporation for the years 1976 - 1980 (Excluding any delinquent amounts due to the Fund)	$ 687,846
6.	Contributions made to the ILGWU Retirement Fund by all employers exclusive of those who withdrew during the period April 29, 1980 through December 31, 1980 for the years 1976 - 1980	$525,148,426
7.	Unamortized amount as of December 31, 1981 of the change in unfunded present value of vested benefits	

	for withdrawal liability purposes during 1980	$223,905,100
8.	Barbizon Corporation's allocated share of item (7) = (5) x (7) divided by (6)	$ 293,274
9.	Contributions required to be made by Barbizon Corporation for years 1977 - 1981 (Excluding any delinquent amounts due to the Fund)	$ 612,682
10.	Contributions made to the ILGWU National Retirement Fund by all employers [exclusive of those who withdrew during the period April 29, 1980 through December 31, 1981] for the years 1977 - 1981	$591,121,170
11.	Change in unfunded present value of vested benefits for withdrawal liability purposes during 1981	[$ 40,754,400]
12.	Reallocated noncollectibles at December 31, 1981	$ 862,200
13.	Barbizon Corporation's allocated share of item (11) and item (12) = (9) x (11) + (12) divided by (10)	$(41,347)
14.	Barbizon Corporation's allocated share of liability = (4) + (8) + (13)	$ 1,509,139
15.	Deductible - $50,000 less the amount by which item (14) exceeds $100,000 but not less than $0	$ N/A
16.	Barbizon Corporation's final withdrawal liability = (14) - (15)	$ 1,509,139

APPENDIX J

Telex: 710 581 3836 Cable: Corpobarb New York
Tel: (212) 684-5720

THE BARBIZON CORPORATION
475 FIFTH AVENUE
NEW YORK N.Y. 10017

ILGWU National Retirement Fund
218 West 40th Street
New York, New York 10018

Attn: Mr. Bert N. Obrentz

Re: Barbizon Corporation Alleged Withdrawal Liability

Gentlemen:

This letter is in response to your letter of June 17, 1983 in which you state that the Barbizon Corporation has withdrawn from the ILGWU National Retirement Fund in 1983. You state that quarterly payments of $42,614 are due for 13.6128899 years from August 20, 1983 to amortize an alleged Barbizon withdrawal liability of $1,509,139.

Barbizon disputes your contention that it has withdrawn from the fund, disputes the amount of alleged withdrawal liability, denies that any withdrawal liability is due, and requests a review by the fund of the information which is attached and specifically incorporated in this letter.

Cordially yours,

Thomas Foley

Vice President

TF:dc
Enclosure

The Barbizon Corporation ("Barbizon") disputes and requests a review by the fund of the alleged withdrawal liability of $1,509,139. It is Barbizon's contention that if any amount of withdrawal liability is determined to be owed by Barbizon, it should only be related to the Barbizon employees who were previously represented by the ILGWU in Montville, New Jersey. More specifically, Barbizon's dispute is as follows:

(1) Barbizon disputes the fund's inclusion of amounts of withdrawal liability related to the Barbizon of Utah, Inc. Provo, Utah plant which ceased being covered by the ILGWU collective bargaining agreement on January 31, 1980 (the announcement of the Provo, Utah plant permanent closing was communicated to the ILGWU on November 26, 1979, said communication being acknowledged by the union on December 5, 1979.) Both dates were prior to the September 26, 1980, Multi-Employer Pension Plan Amendment Act (MPPAA) enactment date, with the collective bargaining agreement expiring prior to the retroactive application of the MPPAA. Also, said dates are prior to the fund's 1980 increase in benefits which have substantially increased the amount of withdrawal liability.

(2) Barbizon disputes the constitutionality of the MPPAA, including but not limited to, the MPPAA's application to the circumstances of the alleged withdrawal liability.

(3) Barbizon disputes the inclusion of any amount of withdrawal liability based upon Barbizon's payment of contributions on behalf of subcontractors

who are independent contractors and not related to Barbizon. The independent contractors and their employees remain covered by the fund with current contributions still being made on their behalf. Furthermore, application of the de minimis rule to each subcontractor should eliminate or substantially reduce any withdrawal liability. Also, if Barbizon's liability is based on contributions made on behalf of such subcontractors, then there should be no withdrawal liability inasmuch as Barbizon will continue to make contribution on behalf of such subcontractors.

(4) Barbizon contends that there is a labor dispute existing between Barbizon and the ILGWU. All issues related to such matters are within the exclusive jurisdiction of the National Labor Relations Board and basing withdrawal liability on the employees' right to freely chose their collective bargaining representative is improper,

(5) Based on the fund's own calculations, there is a $45,000 overstatement in the withdrawal liability calculation made by the fund.

(6) Barbizon disputes the amount of alleged contributions as set forth in the fund's letter of June 17, 1983 addressed to Barbizon, including but not limited to the 2.5% increase in Barbizon's contributions made during 1975-1979 (from the fund's calculation of $690,535 to $707,543) over the amounts for the same period as shown in the fund's August 18, 1982 letter, addressed to Barbizon. Similar increases were made for the 1976-1980 period.

(7) Barbizon disputes the fund's use of a 6.5% interest rate assumption for determining any withdrawal liability. Barbizon contends that a higher interest rate is applicable, such as the interest rate promulgated by the Pension Benefit Guaranty Corporation.

(8) Barbizon disputes the fund's inconsistency in methods in calculating Barbizon's alleged $1,509,139 withdrawal liability vis-a-vis the methodology as outlined by the proposed ILGWU request for the Pension Benefit Guaranty Corporation's approval of special withdrawal rules.

(9) Barbizon disputes the withdrawal liability and requested installment payments as being necessary to fund the fund's excessive administrative expenses.

(10) Barbizon contends that the fund's trustees have violated their fiduciary duties by increasing benefits in 1980, while the fund was faced with an exorbitant amount of liability, said breach of fiduciary duties resulting in a substantially higher amount of alleged withdrawal liability assessed to Barbizon.

Because there is a likelihood that Barbizon may raise other disputes and request for review of certain information after it has had an opportunity to review the responses and answers to Barbizon's disputes, request for additional information and request for review, Barbizon specifically requests the right to dispute other matters which may be raised subsequent to the receipt of said responses and answers by the fund. Furthermore, Barbizon also specifically

requests the opportunity to present additional disputes and requests for review based upon any additional grounds which may come to the attention of Barbizon.

Although Barbizon at this time is not requesting that the disputes be arbitrated pursuant to a ERISA Section 4221 "Resolution of Disputes," Barbizon is putting the fund on notice that any of the fund's responses and answers which are not accepted by Barbizon, may be the subject of arbitration pursuant to said ERISA section. Barbizon will properly notify the fund of any initiation of the arbitration proceeding within sixty (60) days after the fund has notified the employer pursuant to ERISA Section 4219(b) (2) (b) of its basis for decision and responses to Barbizon's request for review.

The requested additional information is as follows:

(1) Copies of the latest summary plan description, the complete 1982 5500 Form including Schedule B and the last three full actuarial reports.

(2) Copies of the Trustees' minutes or other appropriate documents describing (in detail):

a. All the methods and assumptions used for determining withdrawal liabilities.

Evidently contribution amounts instead of salaries or contribution rates are contribution base units. What authority is this procedure based on?

What interest, expense, mortality, retirement age and other assumptions were used? How was "de minimis" reflected? How were outstanding withdrawal liability claims reflected? What is the magnitude of these?

How has the Fund valued the outstanding claims for withdrawal liability and how has the fund reduced the amount of unfunded vested benefits related thereto?

Have the Trustees applied the same methodology in computing withdrawal liabilities of all departing employers? Have you changed any methods or assumptions used in computing withdrawal liabilities since January 1, 1979 which might constitute an increase in the employers' contributions or liabilities?

Please describe any exceptions for our review of possible application to Barbizon.

b. The amortization factors and related period and interest assumptions used for determining the quarterly payments. Please show the actual calculations for our ease in reconciliation.

(3) The Fund's June 17, 1983 letter shows about a 2.5% increase in Barbizon's contributions during 1975-1979 (from $690,535 to $707,543) over amounts for the same period shown in the Fund's August 18, 1982 letter. Similar increases were made for the 1976-1980 period.

Please explain the reason for these increases.

(4) The Fund has previously raised questions over whether a withdrawal occurred on November 26, 1979 when the closing of the Barbizon of Utah, Inc. Provo, Utah plant was announced.

If such a withdrawal did occur what change in Barbizon's 1983 withdrawal liability of $1,509,139 should be made?

The Barbizon of Utah, Inc. plant was closed before the Multiemployer Pension Plan Amendment Act (MPPAA) was enacted on September 26, 1980. Are the Trustees asserting MPPAA applies retroactive to the Barbizon of Utah, Inc. plant closure? Has this approach been applied to all similar plant closings of other employers?

Since the Master Labor Contract expired January 31, 1980 and a new contract was not adopted until June, 1981, was Provo covered by MPPAA's retroactive application to April 29, 1980? What grounds does the Fund have for this retroactive coverage? What would Barbizon's 1983 withdrawal liability be if the Provo plant was never covered by MPPAA? Did Provo have an "obligation to contribute" for any periods covered by MPPAA?

What outstanding claims related to similar cases are reflected in the Fund's withdrawal liabilities and what is the status of the pending claims? Are any being contested?

(5) We understand in 1980 or 1981 the Trustees substantially expanded the ILGWU National Retirement Fund's benefits. This included increasing monthly pensions from $100 to $120 for 20 years service, (ten years service if disabled) with another $0 to $30 increase in monthly pension for employees with final 60 months average earnings from $15,000 to $30,000.

Was this improvement effective before Barbizon of Utah, Inc.'s plant's contract expired on January 31, 1980 and said plant's announcement of closure in November, 1979? Didn't the Trustees execute this increase at a later date such that MPPAA doesn't

require (or doesn't allow) retroactive increase in any such 1980 withdrawal liabilities.

We understand the 1980 benefit increases were granted by an arbitrator. Did the arbitrator allocate any of these liability increases to the 1980 withdrawals? Under what authority were the benefits increased in 1980?

Please discuss whether the Trustees allocated these increased liabilities to other employers who withdrew in 1979 and early in 1980.

What would Barbizon's withdrawal liability be if these increases were not allocated to the Barbizon of Utah, Inc. plant because of the closure preceding the MPPAA execution date?

(6) We understand from discussions with the PBGC and other sources the Trustees may be making certain (industry employment projection) decisions impacting Barbizon's withdrawal liability.

These relate to the handling of partial terminations and the cyclic nature of the apparel industry.

Are some withdrawal liabilities being forgiven or not being fully reflected in the Fund's contribution receivables as suggested by the Fund's request to the PBGC for a special withdrawal method? If so, what are the bases for such forgiveness and how does this impact Barbizon?

(7) As you know, special circumstances exist for the apparel industry, vis-a-vis some other industries covered by MPPAA, in that a lot of work is done by subcontractors. These small employers and their employees may remain covered by the Fund with

current contributions still being made after an employer they previously contracted with, like Barbizon, has shutdown all or part of its operations.

What special rules have the Trustees enacted to prevent duplication of payment of withdrawal liabilities? (i.e., by the continuing subcontractor and the departing contractor).

(8) Sometimes employers like Barbizon pay the subcontractor's contribution to the ILGWU National Retirement Fund. Sometimes the payments are made by the subcontractor and other times Barbizon has made the payment as an administrative convenience to the subcontractor.

How have the Trustees separated these different contribution bases in determining withdrawal liabilities? Have Barbizon's withdrawal liabilities been adjusted to not include any liabilities related to contributions made as an administrative convenience to the subcontractor? Have any other employers had similar reductions?

(9) What "de minimis" rule has been followed by the Trustees since enactment of MPPAA?

How has this been applied to subcontractors who are the "employers of record" and how has this been reflected in Barbizon's alleged withdrawal liability?

(10) Would the Trustees consider a transfer of both assets and liabilities to a successor single employer plan by Barbizon? This would relate to liabilities for Barbizon's own employees as opposed to liability for its subcontractors' employees.

What liabilities would be allocated to Barbizon's own employees?

(11) What is the status of the Fund's request to the PBGC for special withdrawal rules retroactive to April 29, 1980?

Are the actual rules used by the Fund based on the *assumption* this request will be approved? What change in Barbizon's withdrawal amounts will be made if the PBGC doesn't approve this request? Please send us a copy of the 1981 partial and complete withdrawal rules adopted by the Trustees.

(12) What events prompted the Trustees conclusion Barbizon has a 1983 *full* withdrawal?

How has the future contribution stream by subcontractors been applied to reduce Barbizon's 1983 and future years' withdrawal contributions?

(13) What has the net annual effective investment return been for the Fund for each of the past 10 years?

We understand that the Fund in the past has agreed to allow an employer to make the withdrawal payment into an escrow account which has provisions for returning all or a portion of the money to the employer in the event the employer is successful in disputing the liability. Is this correct? If so, will Barbizon be given this opportunity? We have previously requested this information from the Fund but it has not been received.

We wish for our advisors to complete their reviews so we can resolve this matter as soon as feasible. Accordingly, we would appreciate it very much if you could forward by express mail (at our expense) any of this information as soon as it is available. Also, our advisors will call you to discuss various matters and would like to meet with you soon after we receive your response to this letter.

APPENDIX K

ILGWU NATIONAL RETIREMENT FUND
218 West 40th St., New York, N.Y. 10018
(212) 398-3870

CERTIFIED NO. P481 008 058

December 8, 1983

The Barbizon Corporation
475 Fifth Avenue
New York, NY 10017

Re: Withdrawal Liability
The Barbizon Corporation

Gentlemen:

We respond in relevant part to your undated letter reference the above captioned matter and enclose herewith the following documents:

1. Copy of the latest Summary Plan Description of the ILGWU National Retirement Fund (the Fund).
2. Copy of Form 5500 and accompanying Schedule B filed by the Fund for the year 1982. Copies of the filings for the years 1981 and 1980 were supplied on your behalf to Hazelhurst & Associates, Inc. on January 1982.
3. Copy of the Fund Actuary's Statement of Assumptions used to determine the present value of vested benefits for withdrawal liability purposes.

At this time we can also confirm that:

4. The Fund has followed the relevant statute with respect to the "de minimis" deduction.

5. The increase in The Barbizon Corporation's (Barbizon) contributions for the period 1975-1979 merely reflect a correction in the Fund's records.

6. As of this date the Pension Benefit Guaranty Corporation has not acted on the Fund's application with respect to the adoption of Special Withdrawal Liability Rules.

7. Finally, responding to your specific question, we find in the instant matter that the circumstances of Barbizon's withdrawal from the Fund do not conform to the requirements which would allow for an escrow agreement.

As to the many other questions presented, we do not find these to be germane to the present review of Barbizon's withdrawal liability and obligations to the Fund.

Very truly yours,

Theodore Bernstein, Director

/s/ Bert N. Obrentz
By: Bert N. Obrentz

BNO:r
enclosure

APPENDIX L

MITCHELL, CLARKE, PATE, ANDERSON
& WIMBERLY
Attorneys at Law
Georgia Federal Savings Building
20 Marietta Street, N.W.
Atlanta, Georgia 30335
404-577-6010

William M. Cheves

February 1, 1984
Certified Mail No. 7282058
Return Receipt Requested

Mr. Bert N. Obrentz
ILGWU National Retirement Fund
218 West 40th Street
New York, New York 10018

Re: Request for Arbitration Pursuant to Section 4219 of the Multiemployer Pension Plan Amendments Act of 1980/The Barbizon Corporation

Dear Mr. Obrentz:

As my previous correspondence to the ILGWU National Retirement Fund ("the Fund") indicates, this law firm represents The Barbizon Corporation concerning the alleged withdrawal liability owed to the Fund according to your letter dated June 17, 1983. Pursuant to Section 4221 of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), The Barbizon Corporation ("Barbizon"), does hereby request arbitration of the disputed amount of alleged withdrawal pension liability in

the amount of $1,509,139.00 as set forth in your letter dated June 17, 1983 (certified letter No. 871426) addressed to Barbizon.

At this time there are not any final regulations concerning the procedures to use under the MPPAA Section 4221 dealing with the request for arbitration of disputes under said Section. However, as you are probably aware, the Pension Benefit Guaranty Corporation ("PBGC") has issued proposed regulations concerning MPPAA Section 4221. Said proposed regulations state that a party seeking arbitration should submit a written notice setting forth the nature of the dispute, the amount involved, and the remedy sought. The proposed regulations further provide that the party initiating arbitration should include with the notice a copy of the plan sponsor's demand for withdrawal liability, the request for reconsideration made by the employer, and the response by the plan sponsor to that request, thus serving to focus the attention of both parties, and the arbitrator, on the existence and nature of the dispute. The proposed regulations further state that the initiating party must also serve a copy of the notice of initiation of arbitration and attached documents to the collective bargaining representative.

Therefore, pursuant to said proposed regulations by the PBGC, we have attached to our notice of the initiation of arbitration a copy of the ILGWU National Retirement Fund's demand for withdrawal liability (Attachment A), a copy of Barbizon's request for reconsideration and information as set forth in an undated letter from the Barbizon Corporation to the Fund, said letter according to our records having been sent on or about September 15, 1983 (attached as Attachment B), and a copy of the response by the ILGWU National Retirement

Fund to said request by Barbizon (Attached as Attachment C). Furthermore, pursuant to the proposed regulations, we are sending a copy of this notice of initiation of arbitration, by certified mail, to the International Ladies' Garment Worker's Union, 1710 Broadway, New York, New York 10019.

The proposed regulations by the PBGC also state that the arbitrator shall be chosen from a roster of arbitrators who are neutral and have specialized knowledge of ERISA. The regulations suggest the arbitrator be selected by a neutral outside entity such as the American Arbitration Association or the Federal Mediation and Conciliation Services. The proposed regulations also state that the parties must select an arbitrator within 45 days after the notice of initiation of arbitration is served.

As previously stated, Barbizon's contentions concerning a reduction of unfunded liability are basically set forth in an undated letter from the company to the Fund which according to our records were sent on or about September 15, 1983. You have confirmed receipt of said letter when you sent your response to Barbizon's contentions in your letter dated December 8, 1983. Rather than restating Barbizon's contentions and matters for reconsideration by the Fund, please refer to Attachment B to this letter. We would like to further emphasize, as stated in my letter to you dated January 4, 1984 (A copy attached as Attachment D), that the MPPAA Section 4217(a) (2) excludes from allocation of unfunded liability facilities that closed before the Act took effect. It is Barbizon's contention on this point that said statutory provision should reduce the amount of alleged withdrawal liability which you have calculated because of

the permanent closing of the Provo, Utah, plant of Barbizon of Utah, Inc. prior to the enactment of the MPPAA.

If Barbizon's contentions concerning the alleged withdrawal liability (as set forth in Attachment B and D) are not sufficiently clear to you, please notify us and we would be glad to submit additional explanations and support for said contentions and matters raised. The remedy which Barbizon is seeking is a reduction in the amount of unfunded liability alleged by the Fund after Barbizon's contentions and matters raised are effectively resolved.

I would also like to point out that the Fund has failed to effectively respond in its letter of December 8, 1983 to Barbizon's contentions and has failed to provide sufficient information necessary to resolve this matter.

Sincerely yours,

/s/ William M. Cheves
William M. Cheves

WMC:adk

cc: Mr. Wilbur Daniels
International Ladies' Garment
Worker's Union
1710 Broadway
New York, New York 10019
Certified Mail No. 7282060
Return Receipt Requested

APPENDIX M

MITCHELL, CLARKE, PATE, ANDERSON
& WIMBERLY
Attorneys at Law
Georgia Federal Savings Building
20 Marietta Street, N.W.
Atlanta, Georgia 30335
404-577-6010

James W. Wimberly, Jr.

September 18, 1984

Certified Mail No. .....
Return Receipt Requested

Mr. Bert N. Obrentz
ILGWU National Retirement Fund
218 West 40th Street
New York, New York 10018

Mr. Mark Richards
Booth, Lipton & Lipton
405 Park Avenue
New York, New York 10022

Re: Arbitration of Withdrawal Liability issues in *ILGWU National Retirement Fund v. Barbizon*

Gentlemen:

Subsequent to our demand for arbitration in the above-captioned matter, Baribzon sought through its various representatives on several occasions to set up the arbitration. The ILGWU National Retirement Fund has been unwilling to arbitrate.

In an attempt to select an arbitrator, we propose, in the absence of final PBGC Regulations on this subject, to arbitrate the matters in accordance with the Multiemployer Pension Plan Arbitration Rules which are sponsored by the International Foundation of Employee Benefit Plans and administered by the American Arbitration Association. Accordingly, we propose a short conference on a submission agreement pursuant to Section 7 of the Multiemployer Pension Plan Arbitration Rules. We will be happy, of course, to discuss reasonable alternatives to the Multiemployer Pension Plan Arbitration Rules after reviewing your written suggestions in this regard.

The Deficit Reduction Act of 1984, Section 558 removes any doubt you may have had regarding the application of ERISA Section 4217(a) to the permanent closing of the Provo, Utah plant. Section 558(b)(1)(B) extends the so-called "facility" exception from April 29, 1980 to September 27, 1980. Accordingly, for purposes of computing withdrawal liability, contributions applicable to work performed at a facility at which covered operations ceased or for which an obligation to contribute ceased prior to September 26, 1980 may not be taken into account. In addition, this amendment to ERISA places upon the plan the obligation to recalculate withdrawal liability payments based upon the change and to refund overpayments made under the old law.

The case *Erwin Solomon as Trustee of the ILGWU National Retirement Fund et al. v. The Barbizon Corporation et al.*, 83 Civ. 8052 (EW), has been settled. Pursuant to that settlement, Barbizon is obligated to pay certain contributions through the close of 1983. As a consequence,

a total withdrawal of Barbizon could not have occurred in 1983. Therefore, the withdrawal liability calculations should reflect the correct withdrawal date for Barbizon.

In our view, the settlement of the collection suit and the enactment of the Deficit Reduction Act of 1984 are changed circumstances necessitating a recalculation of withdrawal liability by the plan.

In the absence of a prompt and written response to this attempt to select an arbitrator and to obtain an accurate calculation of withdrawal liability, we shall have no alternative but to pursue appropriate legal means for compelling arbitration of the issues raised by our earlier correspondence and by this letter.

Sincerely,

/s/ James W. Wimberly, Jr.
James W. Wimberly, Jr.

DFA:adk

APPENDIX N

ILGWU NATIONAL RETIREMENT FUND
218 West 40th St., New York, N.Y. 10018
(212) 398-3870

December 11, 1984

James W. Wimberly, Jr., Esq.
Mitchell, Clark, Pate, Anderson & Wimberly
20 Marietta Street, N.W.
Atlanta, Georgia 30335

Re: Withdrawal Liability
The Barbizon Corporation

Dear Mr. Wimberly:

We respond herewith to your letter of September 18, 1984.

First, there can be no reading of section 558 of the Deficit Reduction Act of 1984 that would lead us to amend the amount of The Barbizon Corporation's (Barbizon) withdrawal liability.

Secondly, should it be determined at some later date that Barbizon's complete withdrawal occurred in 1984, an appropriate calculation of Barbizon's withdrawal liability will be made at that time.

Very truly yours,

/s/ Bert N. Obrentz
Bert N. Obrentz

BNO:r
cc: Marc E. Richards, Esq.

APPENDIX O

MITCHELL, CLARKE, PATE, ANDERSON
& WIMBERLY
Attorneys At Law
Georgia Federal Savings Building
20 Marietta Street, N.W.
Atlanta, Georgia 30335
404-577-6010

James W. Wimberly, Jr.,

February 6, 1985

Certified Mail
No. 7282080
Return Receipt Requested

Mr. Bert N. Obrentz
ILGWU National Retirement Fund
218 West 40th Street
New York, New York 10018

Certified Mail
No. 7282081
Return Receipt Requested

Mr. Marc Richards
Booth, Lipton & Lipton
405 Park Avenue
New York, New York 10022

Re: Arbitration of Withdrawal Liability Dispute

Gentlemen:

This letter shall serve as The Barbizon Corporation's (Barbizon) demand to arbitrate the disputes raised in its letter of September 18, 1984 (Exhibit E) and the ILGWU

National Retirement Fund's (Fund) answer thereto, dated December 11, 1984 (Exhibit F), true copies of which letters are attached hereto, incorporated herein by reference, and labeled as indicated herein. This demand for arbitration is made pursuant to §4221 of the Employee Retirement Income Security Act of 1974, as amended (ERISA) and the proposed and final regulations ancillary to ERISA, as amended.

The nature of this dispute concerns developments subsequent to:

1. The Fund's June 17, 1983 notice to Barbizon of the imposition of and demand for $1,509,139 in withdrawal liability (a true copy of which is attached hereto, incorporated herein and labeled Exhibit A);
2. Barbizon's request for review thereof (a true copy of which is attached hereto, incorporated herein and labeled Exhibit B);
3. The Fund's response to Barbizon's request for review (a true copy of which is attached hereto, incorporated herein and labeled Exhibit C); and
4. Barbizon's demand for arbitration concerning the issues thereby raised (a true copy of which is attached hereto, incorporated herein and labeled Exhibit D).

These subsequent developments include the settlement of a suit brought by the Fund against Barbizon in the Southern District of New York, No. 83 Civ. 8052 (E.W.) and the enactment of the Deficit Reduction Act of 1984, §558, which developments are more fully described in Exhibits E and F attached hereto. Furthermore, Barbizon reserves its rights to maintain that the Fund failed to

provide Barbizon with a "reasonable" review of its contentions in the correspondence attached hereto (Exhibits A-F) and that DEFRA §558 is applicable to this case either because of its retroactive effect or because a partial withdrawal may have occurred prior to September 25, 1980.

The remedy sought is a reduction in the amount of withdrawal liability assessed and demanded by the Fund against and from Barbizon.

In the absence of final regulations, and in the interest of economy, we propose combining the issues herein raised with the previously demanded arbitration. (See Exhibits A through D). Accordingly, we again propose arbitration in accordance with the Multi-Employer Pension Plan Arbitration rules, sponsored by the International Foundation of Employee Benefit Plans and administered by the American Arbitration Association. We will be happy, of course, to discuss reasonable alternatives to this proposal after reviewing your written suggestions in this regard.

Sincerely,

/s/ James W. Wimberly, Jr.
James W. Wimberly, Jr.

DFA:adk

cc: Mr. Wilbur Daniels
International Ladies Garment
Workers Union
1710 Broadway
New York, New York 10019
Certified Mail No. 7282088
Return Receipt Requested

APPENDIX P

ILGWU NATIONAL RETIREMENT FUND
218 West 40th St., New York, N.Y. 10013
(212) 398-3870

August 18, 1982

James W. Wimberly, Jr., Esq.
Mitchell, Clarke, Pate, Anderson & Wimberly
Georgia Federal Savings Building
20 Marietta Street, N.W.
Atlanta, Georgia 30335

Re: The Barbizon Corporation
Withdrawal Liability

Dear Mr. Wimberly:

For the purpose of summarizing our discussion on August 13, 1982 and as a point of reference for what follows, we will first briefly describe the conditions that create a withdrawal liability on the part of a contributor to a multi-employer pension plan.

All of these conditions are detailed in sections 4203 and 4205 of the Employee Retirement Income Security Act of 1974 (ERISA) as amended by the Multiemployer Pension Plan Amendments Act of 1980 (the Act).

A. *Withdrawal Liability*

1. *Complete Withdrawal*

A complete withdrawal, as the term implies, occurs when a contributor who was obligated to contribute to a plan after April 28, 1980, permanently ceases to contribute to that plan. The cessation may come as the result of *inter alia* the failure to renew a

collective bargaining agreement or the termination of all covered operations under the plan.

It is our understanding that after the effective date of the Act, a change to a company sponsored plan from an obligation to contribute to a multiemployer plan under the same collective bargaining agreement would be considered as a complete withdrawal under the Act.

2. *Partial Withdrawal*

The Act also creates a partial liability following the occurrence of either

a. A 70% decline in contributions to a plan for three consecutive years (the testing period). As applicable to the ILGWU National Retirement Fund (the Fund), the first of such years would be plan year (calendar) 1981. We will describe below specifically how such a decline applies to the Barbizon Corporation, or;

b. (1) A contributor after April 28, 1980 ceases to contribute under under one or more but fewer than all of the collective bargaining agreements under which it was obligated to contribute but continues to perform work in the jurisdiction of the collective bargaining agreement of a type for which contributions were previously required *or* transfers such work to another location, or

(2) if the contributor who was obligated to contribute for work performed at one or more facilities ceases to have an obligation to contribute for work performed at one or more

of those facilities but continues to perform work at that facility.

As distinguished from the three year testing period under a. above the partial withdrawal liability under b(1) and (2) is incurred immediately upon the happening of any of the above described events.

B. *Potential Estimated Withdrawal Liability*
The Barbizon Corporation

1. *Complete Withdrawal*

If under the conditions described in A1. above, The Barbizon Corporation (Barbizon) had completely withdrawn from the Fund during the year 1981, Barbizon's withdrawal liability would have been $1,596,231 (see Exhibit I attached).

2. *Partial Withdrawal (70% decline in contributions)*

a. As described in A.2.a. above and as detailed in section 4205(b)(1) of the Act, Barbizon would incur a partial withdrawal liability if in any three consecutive plan years commencing 1981, contributions to the Fund are 70% below the average of the highest two plan years within the five years immediately preceding the first year of decline. Before any adjustment for increased percentage rates of contribution for the five years immediately preceding 1981, Barbizon made the following contributions to the Fund:

1976	$106,228
1977	127,070
1978	195,866
1979	171,422
1980	70,251

The two highest years of contributions were 1977 and 1978. The average of the two is $183,644. The Act identifies this amount as the "high base year". A 70% decline therefore in contributions by Barbizon, from this high base amount would initiate the first of the three year testing period which could lead to a partial withdrawal.

Since Barbizon's contribution to the Fund for 1981 was $31,067, a decline of more than 70% has occurred and the first of the three year testing period has now accrued. Should Barbizon's contributions therefore for 1982 and 1983 only continue at the 1981 level, Barbizon will have created a partial withdrawal and be liable to the Fund in an amount proportionate to such decline as determined under Section 4206 of the Act.

Should Barbizon's contributions for either 1982 or 1983 rise above $55,093 (30% of $183,644) the three year testing period would be tolled. To avoid a partial withdrawal under the 70% test therefore it would appear to be in Barbizon's best interest, at a minimum, to increase such contributions above the 30% level.

b. Since Barbizon was obligated to make contributions under more than one collective bargaining agreement, should Barbizon transfer work of a type for which it was previously required to make contributions to the Fund, without continuing to make such contributions, then a partial withdrawal may also occur. Such circumstances

would include work performed in Puerto Rico, for which contributions would not be made. Here too, the Act does not distinguish between the withdrawal that occurs as a result of a change in contributions from a multiemployer plan to a company plan. Moreover we do not believe the underlying intent of the Act would permit the Fund to find such a change as mitigating Barbizon's liability.

C. *The effect of amortizing the Fund's unfunded vested benefits.*

Section 4211(b)(2)(C) of the Act mandates that a plan must amortize its unfunded vested benefits over a period of twenty years. The net effect of course is a reduction of the potential withdrawal liability for current and continuing contributors.

The following best illustrates the effect of this requirement on Barbizon's potential withdrawal liability. Reference to Exhibit II indicates that if Barbizon had completely withdrawn from the Fund during the period April 29, 1980 through December 31, 1980, the respective unfunded amount applicable to such a withdrawal was $887,914,500. Barbizon's proportionate share would have been $1,363,321.

Continuing the hypothesis, if Barbizon had completely withdrawn in 1981 the applicable unfunded vested amount was reduced to $843,518,800 and Barbizon's share would have been $1,295,159.

Tentatively, we have been advised by the Fund's actuary that 1982 withdrawals will be subject to a further amortized unfunded vested amount of $799,123,100.

Finally, insofar as Barbizon may have accrued or may accrue a partial withdrawal liability, we have estimated that liability at the present time would be approximately $1,325,000. Since there is an arithmetic correlation between partial withdrawal and complete withdrawal liability, it is obvious that the same advantages of the Act's amortization requirements would accrue to Barbizon by avoiding the creation of a partial withdrawal in the immediate future. In conclusion, we trust that all of the above will assist you in advising your client with respect to this matter and if I can be of any further assistance, please feel free to contact me.

Very truly yours,

Theodore Bernstein, Director

/s/ Bert N. Obrentz
By: Bert N. Obrentz

BNO:r

enclosure

cc: Wilbur Daniels

EXHIBIT I

ESTIMATED EMPLOYER WITHDRAWAL LIABILITY

Through Plan Year 1980

1. Contributions required to be made by The Barbizon Corporation for years 1975 - 1979 (excluding any delinquent amounts due to the Fund)	$ 690,535
2. Contributions made to the ILGWU National Retirement Fund by all employers for the years 1975 - 1979	$449,736,351
3. Unamortized amount as of December 31, 1980 of the unfunded present value of vested benefits for withdrawal liability purposes determined as of December 31, 1979	$843,518,800
4. The Barbizon Corporation's allocated share of item (3): (1) x (3) divided by (2)	$ 1,295,155
5. Contributions required to be made by The Barbizon Corporation for the years 1976 - 1980 (excluding any delinquent amounts due to the Fund)	$ 670,838
6. Contributions made to the ILGWU National Retirement Fund by all employers exclusive of those who withdrew during the period April 29, 1980 through December 31, 1980 for the years 1976 - 1980	$525,148,426
7. Change in unfunded present value of vested benefits for withdrawal purposes during 1980	$235,689,600

8.	The Barbizon Corporation's allocated share of item (7) = (5) x (7) divided by (6)	$ 301,076
9.	The Barbizon Corporation's allocated share of liability = (4) + (8)	$ 1,596,231
10.	Deductible - $50,000 less the amount by which item (9) exceeds $100,000 but not less than $0	$ ——
11.	The Barbizon Corporation's estimated final withdrawal liability = (9) – (10)	$ 1,596,231

EXHIBIT II

Withdrawal liability for The Barbizon Corporation has been calculated as follows:

1. Total amount of the Plan's unfunded vested benefits for Plan years as of December 31, 1979	$887,914,500
2. Total of all contributions made by employers for Plan years 1975 through 1979	$449,736,351
3. The Barbizon Corporation's contributions for Plan years 1975 through 1979	$ 690,534
4. The Barbizon Corporation's withdrawal liability before application of the deductible allowance [(Item 3 ÷ Item 2)X Item 1]	$ 1,363,321
5. De minimis deductible allowance:	
a. If withdrawal liability is $150,000 or greater, the deductible is zero.	—
b. If the withdrawal liability is less than $150,000 but greater than or equal to $100,000, the deductible is $50,000 less the excess of the liability over $100,000.	
c. If the withdrawal liability is less than $100,000, the deductible is $50,000.	

The Barbizon Corporation's deductible is (a)	- 0 -
6. Net withdrawal liability [Item 4 - Item 5]	$ 1,363,321

APPENDIX Q

INTERNATIONAL LADIES' GARMENT
WORKERS' UNION
AFL-CIO

1710 Broadway • New York, N.Y. 10019
Cable Address: ILGWU—New York
Phone: Columbus 5-7000

June 20, 1980

James H. Goodfriend, Esq.
Tenzer, Greenblatt, Fallon & Kaplan
The Chrysler Building
405 Lexington Avenue
New York, New York 10018

Re: Agreement Relating to Closing of Provo Plant

Dear Mr. Goodfriend:

This will confirm our understanding that as attorneys for the respective parties, we have reached agreement upon the language and substance of the attached contract relating to the closing of the employer's Provo plant, except for the attached Schedule 1 which must be verified by the Union before we agree that it is accurate. I have initialed each page of the contract itself to signify our agreement and request you do the same on the copy you return to me. Said attached contract, however, will be executed by the Union only upon the successful conclusion of negotiations between the parties relating to the Master Agreement and Pinebrook Supplement.

It is also my understanding that upon receipt of this letter The Barbizon Corporation will authorize payment of liquidated damages and vacation pay to the eligible employees at the Provo plant.

If the above meets with your approval, please so indicate by countersigning a copy of this letter and returning it and the enclosed copy of the contract, initialed by you, to me.

Very truly yours,

/s/ Joseph Good
Joseph Good
Attorney for International
Ladies' Garment Worker's
Union

c: Wilbur Daniels, Esq.

AGREED:

/s/ James H. Goodfriend
James H. Goodfriend, Esq.
Attorney for The Barbizon Corporation

Dated: June 24, 1980

TENZER, GREENBLATT, FALLON & KAPLAN
Counsellors at Law
The Chrysler Building
405 Lexington Avenue, New York, New York 10017

(212) 573-4300

June 13, 1980

Joseph Good, Esquire
ILGWU - 2nd Floor
1710 Broadway
New York, NY 10019

Dear Joe:

Enclosed for your final review is the agreement covering the termination of the Provo operations incorporating all of the changes discussed at our June 11, 1980 conference. Please review the enclosure and furnish the undersigned with written confirmation that same constitutes the final and binding agreement between Barbizon and ILGWU whereupon we shall forthwith instruct the appropriate personnel to prepare and issue the checks required by Schedule 1 thereto.

Please also furnish the undersigned with a copy of the "Genesco letter" to which you referred at our June 11, 1980 conference.

Mr. Ritter and I look forward to meeting with you and Mr. Daniels at 2:00 p.m. on June 18, 1980.

Very cordially yours,

TENZER, GREENBLATT, FALLON
& KAPLAN
/s/ James H. Goodfriend
James H. Goodfriend

JHG:jmc

cc: Anthony Ritter

THIS AGREEMENT made and entered into this day of June, 1980, by and among THE BARBIZON CORPORATION and BARBIZON OF UTAH, INC. (hereinafter collectively referred to as the "Employer") and INTERNATIONAL LADIES' GARMENT WORKERS' UNION (the "Union") for and in behalf of itself and those of its members of the bargaining unit who were in the employ of the Employer in Provo, Utah as of January 1, 1980.

WITNESSETH:

WHEREAS, the Employer and the Union have been in a continuous collective bargaining relationship with respect to the plant operated by the Employer in Provo, Utah; and

WHEREAS, the Employer and the Union were parties to a collective bargaining agreement, dated as of February 1, 1977, which expired by its terms on January 31, 1980; and

WHEREAS, prior to the expiration of said agreement, the Union requested that the Employer meet with the Union to negotiate a renewal of the collective labor agreement; and

WHEREAS, the Company advised the Union by letter dated November 26, 1979 that the Employer intended for economic reasons to terminate the operation of the Provo plant when the collective labor agreement expired on January 31, 1980; and

WHEREAS, the Union thereupon asserted claims for damages against the Company on behalf of itself and on

behalf of the workers employed in said plant by reason of the fact that said workers will lose earnings and benefits as well as future earning opportunities and benefits; and

WHEREAS, the Employer has met with the Union and a committee of workers from the Provo plant and the parties have negotiated in good faith with respect to the damages to be suffered by the Union and its members as a result of the closing of the Provo plant; and

WHEREAS, the Employer and the Union have agreed to amend and renew the aforesaid collective agreement effective February 1, 1980; and

WHEREAS, the parties desire to settle and adjust the outstanding issues between them without the expense and delay of litigation or arbitration.

NOW, THEREFORE, the parties hereby agree as follows:

1. The collective bargaining agreement between the Employer and the Union dated as of February 1, 1977, as amended and renewed effective February 1, 1980, shall insofar as it relates to the Provo, Utah plant terminate in its entirety and be of no further force or effect as of the close of business on June 30, 1980, provided the Employer permanently closes said plant for any purpose having to do with the production or other operation requiring bargaining unit employees under the collective bargaining agreement on June 30, 1980. The parties acknowledge that during the period February 1, 1980 through June 30, 1980, the Employer will phase out all

of its operations in Provo, Utah and will close said plant for any purpose having to do with the production or other operation requiring bargaining unit employees under the collective bargaining agreement no later than June 30, 1980. With the termination of the said collective bargaining agreement with respect to the Provo, Utah plant, any and all rights and benefits, obligations or liabilities of any nature whatsoever, other than those which arose during the term of this agreement which expires on June 30, 1980 as provided above, arising out of or in any manner whatsoever related to the said agreement with respect to the Provo, Utah plant (and each and every provision thereof) whether to the Union or to the members thereof who were in the employ of the Employer in Provo, Utah on or before June 30, 1980 shall, except as expressly set forth in paragraph 4 hereof to the contrary, forthwith terminate in their entirety and thereafter be of no further force or effect with respect to the Provo, Utah plant.

2. (a) The parties acknowledge that the damages caused to the Union and to the affected workers by reason of the closing of said Provo, Utah plant are not readily ascertainable. Accordingly, in order amicably to adjust the claims of the Union and the workers, and in full payment, compromise and settlement of, in full accord and satisfaction of, and as liquidated damages for, any and all claims for damages which might or could be asserted by the Union on its own behalf and on behalf of the workers, or by the workers individually, under and pursuant to the collective bargaining agreement dated as of February 1, 1977, as amended and renewed effective February 1, 1980, and/or by reason of the closing

of the Employer's Provo, Utah plant, the Employer shall pay to each worker whose name appears on the Schedule 1, annexed hereto and made a part hereof, the amount set forth next to the worker's name (i) pro rata vacation pay (calculated, in the case of individuals terminated after May 26, 1980, as of June 30, 1980); and (ii) damages calculated as follows: Each employee who as of January 1, 1980, was employed by the Employer at Provo, Utah for more than twelve (12) months, shall receive One Hundred Fifty ($150) Dollars for each year of employment ["year" being defined as more than six (6) months of employment in any calendar year] up to a maximum of Thirty-Three Hundred ($3,300) Dollars [i.e., twenty-two (22)years of employment].

(b) The Employer and the Union agree that any employee who terminated his employment with the Employer in Provo, Utah prior to January 1, 1980 and whose name therefore does not appear on Schedule 1 shall not be entitled to receive any benefits whatsoever from the Employer as a result of the termination of its operations in Provo, Utah.

(c) As a condition to receiving the payment reflected on Schedule 1, each employee whose name appears thereon shall be required to continue his employment with the Employer in Provo, Utah until such date prior to June 30, 1980 as the Employer, in its sole and absolute discretion, shall select for the termination of such employee's employment. In the event an employee for any reason whatsoever terminates his employment prior to such date, he shall not be entitled to receive the payment reflected in Schedule 1, and the insurance coverage provided in paragraph 4 of this Agreement.

3. The payments required to be made under paragraph 2 above shall be made by check payable to each worker listed on Schedule 1, on the normal pay date immediately following the date of termination of the worker's employment. Each check shall contain an endorsement to the effect that acceptance of the check constitutes a full and complete release and discharge of the Employer from all claims for damages which the said worker might have arising out of the termination of his employment and the closing of the Provo, Utah plant.

4. Upon the execution and delivery of this Agreement and the delivery of all of the checks required under paragraph 2, the Company shall be generally and fully released by the Union and its members from and against any and all claims and demands by the Union and the affected workers arising out of the termination of the aforesaid collective bargaining agreement with respect to the Provo, Utah plant or out of the closing of the Provo, Utah plant, excepting that the Employer agrees: (a) that it will continue to maintain the current insurance policy providing health and welfare benefits for its workers for six (6) months after the termination date of employment of each worker listed on Schedule 1; and (b) that the Employer shall continue to be liable for the contributions required to be made to the union benefit funds pursuant to the collective bargaining agreement for the period up to June 30, 1980.

5. This Agreement with Schedule 1 attached hereto supersedes any and all prior understandings or agreements, either written or oral, between the parties and constitutes their entire agreement with respect to the closing of the Provo, Utah plant.

IN WITNESS WHEREOF, the parties have duly executed this Agreement.

THE BARBIZON CORPORATION

By: .....

BARBIZON OF UTAH, INC.

By: .....

INTERNATIONAL LADIES' GARMENT WORKERS' UNION

By: .....

APPENDIX R

THE BARBIZON CORPORATION
with
INTERNATIONAL LADIES' GARMENT
WORKERS' UNION

Supplemental Agreement for
Provo, Utah plant

effective February 1, 1977—January 31, 1980

CONTENTS

SECTION NUMBER	SUBJECT	PAGE
1.	Plant covered	
2.	Union membership	
3.	Hours—Overtime	
4.	Minimum wages	
5.	Piece rates	
6.	Holidays	
7.	Vacations and length of service payments	
8.	Assignment to other work	
9.	Machine breakdown, waiting time	
10.	Discharge and discipline	
11.	Health and Welfare Fund	

12. Injury on the job
13. Seniority
14. Union cooperation
15. Term

THIS SUPPLEMENTAL AGREEMENT made and entered into as of February 1, 1977, between THE BARBIZON CORPORATION and its subsidiary, BARBIZON OF UTAH, INC., hereinafter collectively designated as the "Employer" and the INTERNATIONAL LADIES' GARMENT WORKERS' UNION, hereinafter designated as the "UNION."

WHEREAS the Employer and the International Ladies' Garment Workers' Union have heretofore entered into an agreement effective as of February 1, 1977, with respect to the Employer's plant in Provo, Utah, hereinafter referred to as the "Master Agreement", and have reached agreement on additional terms applicable to said plant;

NOW, THEREFORE, in consideration of the mutual promises and obligations herein made and assumed, the parties agree as follows:

1. *Plant Covered.*

This supplemental agreement shall be applicable to the Employer's plant in Provo, Utah. This agreement shall be supplementary to and shall be deemed part of the Master Agreement. The terms and conditions of the Master Agreement as specifically supplemented and modified herein for the Provo, Utah plant shall be applicable to that plant.

2. *Union Membership.* (re: ARTICLE III of Master Agreement.)

ARTICLE III of the Master Agreement shall, with respect to the Provo, Utah plant, be suspended and be of no force and effect during such time as it or its enforcement is contrary to the law of the State of Utah, but shall be in full force and effect as soon as and to the extent the law of the State of Utah permits it.

All employees shall be informed by the Employer of the existence of this agreement and the terms thereof and shall be advised by the Employer that in its opinion good labor management relations are and will be best served if such workers become and remain members of the Union.

3. *Hours—Overtime.* (re: ARTICLE VI of Master Agreement.)

ARTICLE VI of the Master Agreement shall be modified to read as follows:

"The standard hours of employment shall be thirty-five (35) hours per week divided equally into the first five (5) working days, and the standard hours of employment per day shall be seven (7) hours with a three-quarter (3/4) hour lunch period. However, the normal operational work week hereunder shall consist of thirty-seven and one-half (37-1/2) hours divided equally into the first five (5) working days of the week, and the normal operational work day hereunder shall be seven and one-half (7-1/2) hours with a three-quarter (3/4) hour lunch period.

"No employee will be required to work any additional overtime after seven and one-half (7-1/2) hours

of work Monday through Fridays. Additional overtime shall be permitted on Saturdays and Sundays, but employees shall not be compelled to work additional overtime on Saturdays or Sundays.

"All work outside the daily regular hours or over seven (7) hours in one (1) day or over thirty-five (35) hours in one (1) week, or on Saturday shall be considered overtime and shall be paid for at the rate of time and one-half and in the event of Sunday work, double time. Overtime work shall not be pyramided."

4. *Minimum wages.* (re: ARTICLE IX of Master Agreement.)

(a) Craft minimum wages shall be no less than the following rates per hour:

* * *

(b) The progression schedule for newly hired inexperienced employees shall be the following:

* * *

(c) If the trial period is extended under Section 1 ARTICLE V in an individual case, the application of the above progression schedule to such case shall be negotiated by the Union and the Employer.

(d) By mutual agreement of the Union and the Employer, a piece work operator may be declared a substandard employee only

(i) if her piece rates are not in dispute by the parties;

(ii) if other operators in the same section have earned on such rates at least 30% above the craft minimum;

(iii) if the operator has been given her fair share of work and has not been moved from operation to operation; and

(iv) if her piece work earnings (after the wage increases have been added) average less than her craft minimum, (a) during the three (3) months following the completion of the six (6) month learning period for a newly hired piece work operator, and (b) during any six (6) month period for any other operator.

If it is agreed by the Union and the Employer that an operator is substandard, she shall be paid at the higher of either (i) her piece rate earnings, or (ii) at an hourly rate half way between the federal minimum wage and the contract minimum.

Such designation of an operator as substandard shall be for a six (6) month period only and must be resubmitted by the Employer for review at the beginning of any six (6) month period for which it seeks such designation.

PROGRESSION SCHEDULE FOR NEWLY HIRED INEXPERIENCED EMPLOYEES

The operator so designated shall be informed of her right to appeal and shall personally receive a copy of such designation of this provision.

5. *Piece rates.* (re: ARTICLE XI of Master Agreement.)

(a) *Piece rate yields*

(i) New piece rates on each operation shall be so as to establish the following hourly yields for piece work employees working under average conditions:

Effective

2/1/77	6/1/77	2/1/78	2/1/79	8/1/79
$3.70	$3.85	$4.12	$4.32	$4.37

The piece rate yields for new rates shall be at least 30% above minimum.

(ii) In computing the actual yield for purposes of subdivision (i) above, the earnings of piece workers who are learners, substandard workers and who have less than six (6) months' experience shall be excluded.

(b) *Time studies.*

The Union recognizes that time studies based on the Employer's historical precepts of industrial engineering are the approved basis for setting piece work rates. Work sheets of all time studies prepared by or for either party and the results of such time studies shall be subject to examination by the other party, including its industrial engineering representative.

(c) *Piece rates and complaints.*

(i) Employees shall have a right to a prompt introduction of piece rates. Until a piece rate for an operation is settled, an employee shall be paid for such work at the rate of his average hourly earnings calculated for his last four (4) week period.

(ii) If a piece rate is introduced and a complaint is made that it is inadequate to assure employees a fair wage, the Employer shall promptly investigate the complaint and test such rate. All tests are to end no later than one (1) month from the date of complaint. If the employer fails during the month to set a rate which would yield to the majority their individual averages or has set

no rate by the end of the month period, the Employer is to pay all those having worked on such work back pay to compensate their individual loss in average earnings and from then on shall continue, weekly, to make up the difference in their average until a proper rate is set, such as will permit a majority to earn their hourly averages; provided in lieu of the foregoing, the Employer may request consultation with an ILGWU engineer to resolve the disputed rate, and if agreement is not reached, either side may proceed to arbitration as herein provided. All grievances shall be in good faith after sufficient trial by the operators of not less than one (1) week to determine whether the piece rate is fair.

If an increase in piece rates shall be justified, such change shall be retroactive and all employees shall be remunerated on the basis of their production for the difference.

The Employer, upon establishing that a piece rate was improperly set, may retest and adjust such rate.

(d) *New styles.*

When employees are transferred to a different style of work, they shall be guaranteed their regular average hourly earnings for a limited time during the training period. This guarantee shall not be for less than two and one-half (2-1/2) days, nor for more than a period to be set jointly by the Employer and the Union, which period shall be reasonable for operators with median earning records. Said employee will then be guaranteed for a limited time her base rate or regular average hourly earnings if her previous regular average hourly earnings were less than the base rate. This guarantee shall not be for less

than one (1) week's period of time, nor for more than a period to be set jointly by the Employer and the Union. However, when piece rates have been determined, those employees whose production at the established rates was greater than the amounts paid shall receive the difference retroactively.

At such times that an operation is discontinued, the employee shall be entitled to accept training on a new operation at the minimum in lieu of being laid off.

(e) *Technological developments.*

When a labor saving method, device or improved machinery is introduced by the Employer, thereby increasing the output of the employees employed on piece rates, such rates shall be adjusted to maintain at least the level of earnings of the piece worker prior to the introduction of such method, device or machine.

(f) *Sample workers.*

The minimum rate shall be equivalent to the hourly yield for a 100% efficient piece work operator. Supervisors will not make samples except for training purposes and in emergency situations.

(g) *Auxiliary workers.*

This classification shall be limited to workers with four or more operations; reasonable time will be provided to retrain such workers where necessary.

Assignments shall be limited to three weeks' work on one operation, except where filling in for a worker on leave of absence; the Employer may, in special circumstances, reasonably extend this period.

(h) *Piece Work Transfers and Seniority.*

The Union and the Employer shall jointly explore the use of departments, styles, and other piece work issues as they affect pieceworkers' transfers and seniority.

(i) The piece rate basis sheet shall reflect the inclusion of an element for piece work related clerical functions.

6. *Holidays.* (re: ARTICLE XII of Master Agreement).

(a) All eligible employees shall receive the following holidays with pay:

New Year's Day

Good Friday

Memorial Day

Independence Day

Pioneer Day (July 24)

Labor Day

First Monday after beginning of official deer season

Thanksgiving Day

Day after Thanksgiving (effective Nov. 24, 1978)

Christmas Day

(b) Holiday pay shall be based for each time worker on seven and one-half (7-1/2) times his regular average hourly earnings and, for each piece worker, on seven and one-half (7-1/2) times his average hourly earnings during March, April and May.

(c) A holiday falling on a Saturday or Sunday shall be celebrated on the prior Friday or following Monday, respectively.

7. *Vacations and length of service payments.*

(re: ARTICLE XIII of Master Agreement.)

(a) Each employee shall be entitled to paid vacation days in accordance with the following schedule.

Length of Employment	Paid Days Off
6 months but less than 7 months	3 days
7 months but less than 1 year	5 days
1 year but less than 2 years	7-1/2 days
2 years but less than 3 years	10 days
3 years but less than 5 years	10 days
5 years but less than 8 years	11 days
8 years but less than 10 years	12 days
10 years but less than 15 years	13 days
15 years but less than 20 years	14 days
20 years but less than 22 years	15 days
22 years but less than 25 years	16 days
25 years but less than 26 years	17 days
26 years and over	20 days

(b) An employee who begins his employment with the Employer on or after January 1st shall not be entitled to paid vacation benefits during that year. Such employee shall receive one (1) additional day's paid vacation in the following year for each month employed prior to June 1st of the previous year in which he was not a payroll loss on the payroll.

(c) The hourly rates for computing vacation pay shall be a time employee's regular hourly rate and a piece worker's average hourly earnings in March, April and May.

(d) An employee who takes vacation leave without the consent of management and thereby causes disruption in work flow shall lose the equivalent in vacation benefits for the time arbitrarily taken.

(e) Vacation benefits will be pro-rated for employees whose employment terminates prior to the beginning of vacation period.

(f) At the discretion of the Employer, provided there is no layoff in the department where such employee is engaged, employees may be requested to accept compensation in lieu of a vacation, in which event benefits will become due prior to September 7th.

(g) An employee shall not be denied desired time off except for production requirements only.

(h) In addition to the vacation pay stipulated in Section 7(a) above, an employee employed two (2) years or more on December 1 of each year, shall receive on December 15 a length of service payment of two (2%) percent of his gross earnings in the last four (4) completed calendar quarters. An employee employed twenty (20) years or more on December 1 of each year shall receive at that time two (2%) percent of his gross earnings in the last four (4) completed calendar quarters, or a week's pay at average, whichever is the greater. For the purpose of this paragraph, "average" shall be defined as the piece worker's average hourly earnings during said last four (4) completed calendar quarters.

Full eligible employees terminated prior to December 1st shall, within thirty (30) days after termination be paid their pro-rata length-of-service payment based on total earnings since November 1st of the preceding calendar year.

A medical leave of up to three (3) months during the second year of employment shall be counted toward the (2) year length of service requirement and shall not break length-of-service for vacation purposes.

(i) If work is required during the vacation shutdown period, the Employer will offer the opportunity to perform such work on the basis of seniority among those qualified.

8. *Assignment of other work.* (re: ARTICLES XV and XVIII, Sections 4 and 5 of the Master Agreement.)

(a) The "average hourly earnings" provided in Section 1 of ARTICLE XV and Sections 4 and 5 of ARTICLE XVIII of the Master Agreement shall be an employee's average hourly earnings calculated for his last four (4) week period.

(b) When an employee runs out of her regular work, she may either go home, or request other work, and if other work is provided, she shall be guaranteed not less than minimum rate per hour earnings while performing the work provided. Any individual problem arising under this provision shall be reviewed with the Shop Committee and any remaining dispute shall be treated as a dispute under the grievance procedure of the Master Agreement.

(c) Average hourly earnings for piece workers shall be calculated only on piece work on the worker's

primary and secondary piece work operations and shall not include earnings at time or on non-primary or non-secondary piece work.

All workers will be classified with a primary and secondary operation.

Opportunities will be given as available to train on secondary operations.

A worker transfered to another than primary or secondary operations will be paid at average until a mutually agreed-on training period is completed (see Section 5(d) above), at which time said operation shall be deemed a secondary operation for that worker.

9. *Machine breakdown—waiting time.* (re: ARTICLE XVI of Master Agreement.)

ARTICLE XVI of the Master Agreement shall be modified to read as follows:

"A piece work employee shall be paid for all time lost from minute one (1) while waiting for work, except for an act of God. In the event of a machine breakdown, such employee shall be paid for all time lost in excess of fifteen (15) minutes in accordance with past practice.

"In the event of a machine breakdown in excess of fifteen (15) minutes duration the employee shall be paid at average back to the first minute of time lost on such breakdown.

"Where an employee is responsible for excessive machine repairs, he may be reimbursed for such lost time on terms differing from the above in joint consultation with the Union.

"Where an employee's machine may be down for more than fifteen (15) minutes, the Employer may assign him to another similar machine until his own machine is in working order again."

10. *Discharge and discipline.* (re: ARTICLE XXII of Master Agreement).

After the trial period, no employee covered by this agreement shall be suspended, demoted or dismissed for any cause except incompetency, misconduct, soldiering on the job, or other just and sufficient cause. Incompetency shall be established prima facie where an employee after three (3) months' service continues to show a substantial payroll loss.

11. *Health and Welfare Benefits.* (re: ARTICLE XXIX, Section 1(a) of Master Agreement.)

The Employer shall not be required to make contributions to a health and welfare fund as provided in ARTICLE XXIX, Section 1(a) of the Master Agreement. In lieu of such contributions, the Employer shall maintain during the term of this agreement a group insurance policy which provides to eligible employees the following health and welfare benefits and shall pay the entire cost of providing such benefits:

(a) accident and sickness benefit—$55 per week for 26 weeks.

(b) member's hospitalization benefit—$45 per day for 100 days, including ancillary and anesthesia—$200 maximum and tuberculosis $350.

(c) Optical—$10 each per employee for examination, frames, lenses.

(d) surgical schedule—$600 maximum.

(e) maternity—$150 - normal delivery,
caesarean section - $225
miscarriage - $75.

(f) special services—$900 per illness.

(g) death and disability benefit—$2,000.

The Employer will pay an additional one (1%) percent of payroll effective February 1, 1978 and an additional one-half (1/2%) percent effective February 1, 1979 for improved health and welfare benefits. The specific benefits to be purchased by these additional funds shall be determined by a joint committee of employees and management.

If it is determined that a better schedule of benefits can be provided through the Union's Health and Welfare Plan, the Employer, in lieu of providing all of the above, will become a participating employer in such Plan and will contribute to such Plan a percentage of payroll equal to its then current cost of providing benefits directly.

12. *Injury on the job.*

An employee injured on the job to an extent which requires a doctor's attention and results in lost time to the employee shall receive a full shift's pay regardless of the time of the injury and such time shall be considered as time worked.

13. *Seniority.*

Seniority shall prevail by department. The employee last hired in each department shall be the first laid off and the last employee laid off shall be the first rehired.

The Employer will make good faith efforts to recall employees on lay-off for part-time work before hiring temporary part-timers.

An employee on medical leave of absence of up to three (3) months duration shall, upon thirty (30) days notice of intended return date, be reassigned to her regular job.

14. *Union cooperation.*

The Union recognizes the responsibility imposed upon it as the exclusive bargaining agent of the above-specified employees and realizes that in order to provide maximum opportunities for continuing employment, good working conditions, and better than average wages, the Employer must be in a strong market position, which means he must produce efficiently. The Union, as the bargaining agency, assumes responsibility for cooperating with management as far as possible to attain those goals. The Union, therefore, agrees that it will cooperate with the Employer and support its efforts to assure a full day's work on the part of its members; that it will actively combat tardiness and absenteeism, or any other practice which restricts production and that it will support the Employer in its efforts to improve production, eliminate waste in production, conserve materials and supplies, improve the quality of workmanship, prevent accidents and strengthen good will between the Employer and its employees.

15. *Term.* (re: ARTICLE XLI of Master Agreement.)

This supplemental agreement shall be effective as of February 1, 1977 and shall terminate on the same

date as set forth in ARTICLE XLI of the Master Agreement, except that if the Union determines that it no longer represents a majority of the employees covered hereby, the Union shall have the option of terminating this supplemental agreement on sixty (60) days' written notice.

IN WITNESS WHEREOF, the parties have caused this agreement to be signed by their respective officers the day and year first above written.

THE BARBIZON CORPORATION

By .....
(Name and Title)

BARBIZON OF UTAH, INC.

By .....
(Name and Title)

INTERNATIONAL LADIES' GARMENT WORKERS' UNION

By .....
(Name and Title)

APPENDIX S

THE BARBIZON CORPORATION

with

INTERNATIONAL LADIES' GARMENT WORKERS' UNION

Supplemental Agreement for
Pinebrook New Jersey plant

effective February 1, 1977—January 31, 1980

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THIS SUPPLEMENTAL AGREEMENT made and entered into as of February 1, 1977 between THE BARBIZON CORPORATION, hereinafter designated as the "Employer" and the INTERNATIONAL LADIES' GARMENT WORKERS' UNION, hereinafter designated as the "Union".

WHEREAS The Barbizon Corporation and the International Ladies' Garment Workers' Union have heretofore entered into an agreement effective as of February 1, 1977 with respect to the Employer's plant in Montvale, New Jersey, hereinafter referred to as the "Master Agreement", and have reached agreement on additional terms applicable to said plant;

NOW, THEREFORE, in consideration of the mutual promises and obligations herein made and assumed, the parties agree as follows:

1. *Plant covered.*

This supplemental agreement shall be applicable to the Employer's plant in Montvale, New Jersey. This agreement shall be supplementary to and shall be deemed part of the Master Agreement. The terms and conditions of the Master Agreement as specifically supplemented and modified herein for the Montvale, New Jersey plant shall be applicable to that plant.

2. *Hours.* (re: ARTICLE VI of Master Agreement)

The daily regular hours shall be 8:00 A.M. to 3:30 P.M. with one-half (1/2) of one hour for lunch. All work outside the daily regular hours or over seven (7) hours in one (1) day or over thirty-five (35) hours in one (1) week or on Saturday shall be considered

overtime and shall be paid for at the rate of time and one-half and in the event of Sunday work, double time. Overtime work shall not be pyramided. No employee shall be required to work any additional overtime after seven and one-half (7-1/2) hours of work Mondays through Fridays. Additional overtime shall be permitted on Saturdays and Sundays, but employees shall not be compelled to work additional overtime on Saturdays or Sundays.

3. *Minimum wages.* (re: ARTICLE IX of Master Agreement)

(a) Craft minimum wages shall be no less than the following rates per hour:

	effective				
craft	2/1/77	6/1/77	2/1/78	2/1/79	8/1/79
packers	3.36	3.53	3.77	3.95	4.00
order pickers, checkers	3.36	3.53	3.77	3.95	4.00
transporters, service floor workers	2.74	2.88	3.08	3.23	3.26
sample makers	3.70	3.85	4.12	4.32	4.37

(b) The progression schedule for newly hired inexperienced employees shall be the following:

	effective				
length of employment	2/1/77	6/1/77	2/1/78	2/1/79	8/1/79
	Transporters and service				
at the end of trial period	2.50	2.60	2.75	2.85	3.00
after 8 weeks	2.74	2.88	3.08	3.23	3.26

length of employment	*effective* 2/1/77	6/1/77	2/1/78	2/1/79	8/1/79
	packers				
at the end of trial period	3.00	3.15	3.25	3.40	3.50
after 8 weeks	3.36	3.53	3.77	3.95	4.00
	order pickers and checkers				
at end of trial period	3.00	3.15	3.25	3.40	3.50
after 8 weeks	3.36	3.53	3.77	3.95	4.00
	floor workers				
at end of trial period	2.74	2.88	3.08	3.23	3.26
	sample makers				
at end of trial period	3.20	3.30	3.47	3.62	3.67
after 8 weeks	3.70	3.85	4.12	4.32	4.37

(c) If the trial period is extended under Section 1 of ARTICLE V in an individual case, the application of the above progression schedules to such case shall be negotiated by the Union and the Employer.

4. *Holidays.* (re: ARTICLE XII of Master Agreement)

(a) All eligible employees shall receive the following holidays with pay:

New Year's Day
George Washington's Birthday
Good Friday
Decoration Day
Independence Day
Labor Day
Thanksgiving Day
Day after Thanksgiving
Christmas Day
Last Working Day Before Christmas
(effective 1978)

(b) Holiday pay shall be based on each employee's average hourly earnings during the six (6) month period beginning December 1st and ending May 31st.

If such employee was not fully employed in said period, holiday pay shall be based on his average hourly earnings during the last computed period of four (4) weeks.

(c) A holiday falling on a Saturday or Sunday shall be celebrated on the prior Friday or following Monday, respectively.

5. *Vacations and length of service payment.*
(re: ARTICLE XIII of Master Agreement)

(a) Employees shall receive from the Employer the following vacation days with pay as stipulated:

Length of Employment	Paid Days Off
6 months but less than 7 months	3 days
7 months but less than 1 year	5 days
1 year but less than 2 years	7-1/2 days
2 years but less than 3 years	10 days
3 years but less than 5 years	10 days
5 years but less than 8 years	11 days
8 years but less than 10 years	12 days
10 years but less than 15 years	13 days
15 years but less than 20 years	14 days
20 years but less than 22 years	15 days
22 years but less than 25 years	16 days
25 years but less than 26 years	17 days
26 years and over	20 days

(b) In addition to the vacation pay stipulated in Section 5(a) above, an employee employed two (2) years or more on December 1 of each year, shall receive on December 15 a length of service payment of two (2%) percent of his gross earnings in the last four (4) completed calendar quarters. An employee employed twenty (20) years or more on December 1 of each year shall receive on December 15 two (2%) percent of his gross earnings in the last four (4) completed calendar quarter, or a week's pay at average, calculated in accordance with past practice, whichever is the greater.

Fully eligible employees terminated prior to December 1st shall, within thirty (30) days after termination be paid their pro-rata length-of-service payment based on total earnings since November 1st of the preceding calendar year.

A medical leave of up to three (3) months during the second year of employment shall be counted toward the two (2) year length of service requirement and shall not break length-of-service for vacation purposes.

(c) Paid vacations up to and including the first two (2) weeks (comprising ten (10) days) shall take place during July and August of each year at the convenience of the Employer. The Employer may continue to close its plant during the first week of July or the first two (2) weeks in July as it has done for many years in the past. The Employer at its option may require the third week of paid vacation to be taken between Christmas and New Year's. The fourth week's vacation for those so entitled shall be taken at a time mutually agreed upon by the parties. A worker shall not be denied desired time off except for production requirements only.

(d) June 1st of each year shall be the date at which service eligibility shall be determined and computed for paid vacation.

(e) Vacation pay for a time worker shall be based on his regular weekly wage.

(f) Any employee who leaves his employment for good reason or whose employment is terminated involuntarily prior to the beginning of vacation period shall

then be entitled to receive his pro-rata vacation pay from the Employer corresponding to the fractional portion of the twelve (12) month period preceding such distribution during which he worked for the Employer.

(g) If work is required during the vacation shutdown period, the Employer will offer the opportunity to perform such work on the basis of seniority among those qualified.

6. *Assignment to other work.*

(re: ARTICLE XV and XVIII, Sections 4 and 5 of Master Agreement)

(a) The "average hourly earnings" provided in Section 1 of ARTICLE XV and Sections 4 and 5 of ARTICLE XVIII of the Master Agreement shall be an employee's average hourly earnings during his last computed period of four (4) weeks of full employment on his regular work or if such period had not been computed, the last four (4) weeks of full employment on his regular work.

(b) An employee who is requested to perform work other than his regular work while his regular work is unavailable shall receive for such work either the established time rates therefor or his average hourly earnings during his last four (4) weeks of full employment on his regular work, whichever are greater.

7. *Samples.*

Supervisors will not make samples except for training purposes and in emergency situations.

8. *Seniority.*

(a) The Employer will make good faith efforts to recall employees on lay-off for part-time work before hiring temporary part-timers.

(b) An employee on medical leave of absence of up to three (3) months shall, upon thirty (30) days' notice of intended return date, be reassigned to her regular job.

9. *Health and Welfare Fund.*
(re: ARTICLE XXIX of Master Agreement)

The percentage contribution provided in Section 1(a) of ARTICLE XXIX of the Master Agreement shall be five (5%) percent towards the Health and Welfare Fund of the Eastern Region, ILGWU. Effective February 1, 1978, such contribution shall become six (6%) percent. Effective February 1, 1979, such contribution shall become six and one-half (6-1/2%) percent.

10. *Term.* (re: ARTICLE XLI of Master Agreement)

This supplemental agreement shall be effective as of February 1, 1977 and shall terminate on the same date as set forth in ARTICLE XLI of the Master Agreement.

IN WITNESS WHEREOF, the parties have caused this agreement to be signed by their respective officers the day and year first above written.

THE BARBIZON CORPORATION

By .....
(Name and Title)

LOCAL 161 of INTERNATIONAL LADIES' GARMENT WORKERS' UNION

By .....
(Name and Title)

INTERNATIONAL LADIES' GARMENT WORKERS' UNION

By .....
(Name and Title)

EASTERN REGION OF INTERNATIONAL LADIES' GARMENT WORKER'S UNION

.....
(Name and Title)

APPENDIX T

THE BARBIZON CORPORATION

with

INTERNATIONAL LADIES' GARMENT WORKERS' UNION

effective February 1, 1977—January 31, 1980

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THIS AGREEMENT made and entered into as of February 1, 1977 by and between THE BARBIZON CORPORATION, and BARBIZON OF UTAH, INC., corporations with plants located respectively in Montvale, New Jersey and Provo, Utah, hereinafter collectively designated as the "Employer", and the INTERNATIONAL LADIES' GARMENT WORKERS' UNION, an unincorporated association, hereinafter designated as the "Union", for and in behalf of itself, such of its affiliates as are or may become parties to agreements with the Employer and the employees now employed or hereafter to be employed by the Employer.

WITNESSETH:

WHEREAS, the Employer represents that it is engaged in the apparel and clothing industry; and

WHEREAS, the workers employed by the Employer have duly designated the Union as their exclusive bargaining representative for the purpose of collective bargaining with the Employer with respect to rates of pay, wages, hours and other conditions of employment; and

WHEREAS, the parties desire to cooperate in establishing conditions which will tend to secure a living wage and improved working conditions, and to provide methods for a fair and peaceful adjustment of all disputes that may arise between the parties;

NOW, THEREFORE, in consideration of the mutual promises and obligations herein assumed and contained, and other good and valuable considerations, the parties agree as follows:

ARTICLE I: MUTUAL OBLIGATIONS

The parties agree that this agreement shall be binding upon them and their respective transferees, successors, and assigns, and that they will faithfully comply with its provisions. The Employer agrees that no sale or transfer of the business or any of the plants shall be made except to a purchaser or transferee who takes subject to and agrees to be fully bound by the terms of this agreement. The Employer shall continue to be liable for the performance of this agreement until such purchaser or transferee expressly in writing agrees to be so bound. Thereafter the Employer shall be discharged from any liability or obligation accruing under the agreement on and after the date of assumption of such responsibility by such purchaser or transferee.

ARTICLE II: UNION RECOGNITION

The bargaining unit covered by this agreement consists of all non-supervisory production, packing and shipping workers and service girls employed by the Employer, hereinafter referred to as "employees". It is agreed that the Union represents a majority of such employees and that it shall be the sole and exclusive bargaining representative for all employees in the bargaining unit during the entire period of this agreement. Neither the Employer nor any of its agents shall directly or indirectly discourage membership in the Union.

ARTICLE III: UNION MEMBERSHIP

The Employer agrees to employ and retain in its employ none but those who are or who become and remain members in good standing of the Union on and after

the thirtieth (30th) day following the beginning of their employment or the execution or effective date of this agreement, whichever is the later. However, all new employees whose trial period under ARTICLE V is longer than said thirty (30) days shall be required to become and remain members in good standing of the Union immediately after the completion of said trial period.

ARTICLE IV: CHECK-OFF

The Employer agrees to deduct membership dues (which shall be deemed to include periodic fixed dues, initiation fees, and assessments) from the earnings of its employees monthly and transmit the same to the Union or its designee promptly thereafter, subject to the requirements of law concerning authorization and assignment by the workers individually.

ARTICLE V: TRIAL PERIOD

1. The trial period for newly hired employees shall be for:

experienced hourly employees	thirty (30) days
inexperienced hourly employees	eight (8) weeks
piece work employees	eight (8) weeks

However, the trial period for a piece work employee who earns the contract minimum (a) at the end of two (2) weeks shall be shortened to two (2) weeks, (b) at the end of three weeks shall be shortened to three (3) weeks or (c) at the end of four (4) weeks shall be shortened to four (4) weeks. In individual cases the trial period may be extended upon the consent of the Union, which consent shall not be unreasonably withheld.

2. An employee may, during his trial period, be discharged without regard to cause.

ARTICLE VI: HOURS—OVERTIME

The standard hours of employment shall be thirty-five (35) hours per week divided equally into the first five (5) working days. All work outside the daily regular hours shall be considered overtime and shall be paid for at the rate of time and one-half. Saturday work as such shall be considered overtime and shall be paid for at the rate of time and one-half. Overtime shall not be pyramided. Conditions for working of overtime may be set forth in plant supplemental agreements.

ARTICLE VII: WAGE INCREASES

Each employee shall receive the following general wage increases or his applicable craft minimum, whichever is greater:

(a) Effective February 1, 1977, all workers covered by this Agreement, both piece workers and time workers, shall receive a wage increase of five (5%) per cent over their compensation as presently computed.

The wage increase for piece workers shall be calculated by adding five (5%) per cent to the total of their piece rate earnings plus the add-on as presently computed.

The wage increase for hourly workers shall be computed by adding five (5%) per cent to their hourly earnings as presently computed.

(b) Effective June 1, 1977, all workers covered by this Agreement, both piece workers and time workers, shall receive a wage increase of five (5%) per cent over their compensation as then computed, including the previous percentage increase.

(c) Effective February 1, 1978, all workers covered by this Agreement, both piece workers and time workers, shall receive a wage increase of seven (7%) per cent over their compensation as then calculated, including the previous percentage increases.

(d) Effective February 1, 1979, all workers covered by this Agreement, both piece workers and time workers, shall receive a wage increase of six (6%) per cent over their compensation as then computed, including the previous percentage increases.

ARTICLE VIII: RISE IN COST OF LIVING

If the U.S. Bureau of Labor Statistics Consumer Price Index—United States City Average (1967-69 = 100) shall increase by two and one-half (2.5%) per cent or more over its level in January, 1977, the Union may request increases in like amounts in the wages of the employees covered by this agreement.

No wage adjustment under this ARTICLE shall become effective prior to February 1, 1978. In any event, no more than one (1) adjustment under this ARTICLE may be effective between February 1, 1978 and January 31, 1979 and no more than one (1) adjustment under this ARTICLE may be effective between February 1, 1979 and January 31, 1980.

Any wage increase under this ARTICLE shall not affect the rights of the employees as to the general wage increases provided in this agreement and said general wage increases shall not affect the right of employees to any increase under this ARTICLE.

Should the Employer and the Union fail to agree upon wage increases under this ARTICLE, the matter shall be deemed a dispute under ARTICLE XXXVIII.

ARTICLE IX: MINIMUM WAGES

1. Craft minimum hourly wages shall be those set forth in the plant supplemental agreements.

2. If an entire section of piece workers is changed to a time work basis for more than a temporary period, minimums for such section shall be twenty (20%) per cent above the applicable craft minimums set forth in the plant supplemental agreement.

ARTICLE X: CHANGE IN LEGAL MINIMUMS

Should legislation be enacted increasing minimum wages under the law, the minimum wages under this agreement shall not be less than thirty-five (35¢) cents above said legal minimum. Upon such increase in minimum wages, corresponding increases shall be made in the piece rate and wage structure of the plants.

ARTICLE XI: PIECE RATES

1. Piece rates on each operation shall be set so as to yield piece work employees working under average conditions the percentage above their craft minimums set forth in the plant supplemental agreements. Piece rates shall take into account time required by employees to prepare production slips and other clerical work.

2. To effectuate the foregoing yield above the craft minimums, either the piece rate base or the add-on to the piece rate base shall be increased to the extent re-

quired. Whichever method is chosen shall be uniformly applied in all cases in each plant.

3. In the determination of whether a new piece rate has been properly set each new piece rate shall be separately considered.

4. When a new piece rate is announced to piece work employees it shall be immediately followed by a job description specifying the production methods to be applied. This description must be kept on file in the plant and be made available upon request.

5. When piece rates are settled, such rates shall be retroactive to the inception of the work.

6. Retroactive payments for adjusted piece rates shall be listed on the pay check or envelope separately together with the period for which such retroactive payment is made.

7. When a piece rate is questioned by a Union representative, the Union shall have the right to initiate its own investigation. Upon notice to the Employer, the Union and the Employer shall arrange a mutually agreeable date for a Union engineer and Company engineer to investigate the rate. If they cannot reach such an agreement within three (3) days, the Union engineer may conduct his investigation of the complaint submitted by the Union representative without the presence of a Company engineer.

ARTICLE XII: HOLIDAYS

1. The holidays set forth in the plant supplemental agreements shall be observed and all employees, whether time or piece workers, shall be paid a full day's pay for

them in any event and regardless of whether such holidays fall on a working day or non-working day of the week or in any non-working week. An employee shall be eligible for holiday pay provided that, while work is available, he works both the full working day before and the full working day after the holiday, unless his absence is for sufficient cause.

2. Holiday pay for each piece worker shall be based upon his average earnings during the period set forth in the plant supplemental agreements.

3. If work is performed on any such holiday, it shall be paid for at the rate of time and one-half in addition to holiday pay.

4. If any such holiday occurs during a vacation shutdown, employees eligible to receive holiday pay shall receive one (1) additional day off with holiday pay as provided in paragraph 1 above.

ARTICLE XIII: VACATIONS

Provision for vacations shall be as set forth in the plant supplemental agreements.

ARTICLE XIV: DISTRIBUTION OF WORK

1. At all times work shall be distributed to employees as equally as possible in each operation.

2. No member of the Employer or supervisory employee or designer or any other person outside the bargaining unit shall perform any work in any job covered by this agreement except in an emergency situation where such work is for less than one-half (1/2) day.

3. If an employee has been laid off and any member of the Employer or supervisory employee or designer or any other person outside the bargaining unit does his work, the Employer shall reimburse the employee so laid off for his loss of earnings and shall immediately reemploy him.

ARTICLE XV: ASSIGNMENT TO OTHER WORK

1. An employee who is requested to perform work other than his regular work while his regular work is available shall receive for such other work his average hourly earnings in his regular work as set forth in the plant supplemental agreements or his earnings in the new work, whichever are greater.

2. An employee whose regular work is unavailable and who is requested to perform other work shall be paid as set forth in the plant supplemental agreements.

ARTICLE XVI: MACHINE BREAKDOWN

A piece work employee shall be paid for all time lost through machine breakdown in excess of fifteen (15) minutes in accordance with previous practice.

Where an employee is responsible for excessive machine repairs, he may be reimbursed for such lost time on terms differing from the above in joint consultation with the Union.

Where an employee's machine may be down for more than fifteen (15) minutes, the Employer may assign him to another similar machine until his own machine is in working order again.

ARTICLE XVII: CALL-IN TIME

All employees who are requested to report for work shall be supplied with at least one-half (1/2) day's continuous work or be paid therefor at their average hourly earnings during the base periods presently used in each shop. Employees who are required to remain for any period thereafter shall be supplied with a normal flow of work or be paid for such period at said average hourly earnings.

ARTICLE XVIII: JOB RIGHTS—ILLNESS—MATERNITY LEAVE—LEAVE OF ABSENCE

1. No employee shall absent himself without sufficient reason. If he has absented himself without sufficient reason and the Employer requests his return and supplies his name and address, the Union shall return him to work within three (3) days after receipt of such request. If he does not return within such three (3) days, the Employer may terminate his employment.

If an employee who has absented himself with or without sufficient reason returns to work, he shall be entitled to his regular job last performed prior to such absence. If such job is not then being performed, he shall be entitled to any other available job with entitlement to his regular job when it is resumed.

2. One (1) year of maternity leave shall be granted to an employee after twelve (12) months' service. Such employee shall return to the same position at the prevailing rate for that position with seniority rights unimpaired at the termination of the leave.

The employee will undertake to give the Employer at least one (1) month's advance notice of the specific date of leaving.

Continual absence from work at the end of the twelve (12) month leave will be just cause for dismissal.

Time spent on such leave of absence shall not count as time worked for the purpose of computing unbroken service.

3. An employee who has been employed for one (1) or more years may request a leave of absence and the Employer shall not unreasonably refuse such request. If such request is granted and the employee overstays the authorized leave period, the Employer may impose a penalty of loss of one (1) day's vacation pay for each week of such unauthorized absence. The Employer may resort to subdivision 1 where such unauthorized absence is of unreasonable duration.

4. An employee shall be granted three (3) consecutive working days off with pay upon the death of a husband, wife, child, stepchild, parent, parent-in-law, guardian, grandparent, brother or sister. Such pay shall be based upon the employee's regular hourly rate; or for a piece worker upon his average straight-time hourly earnings during the period set forth in each plant supplemental agreement.

5. An employee shall be paid for time off for jury duty for a maximum of four (4) weeks. Such pay shall be the difference between jury pay and the employee's regular hourly rate, or for a piece worker, his average straight-time hourly earnings during the period set forth in each supplemental agreement.

ARTICLE XIX: RECALL AFTER LAY-OFF— JOB OPENINGS

1. If the Employer lays off employees during the slow season, it shall upon resuming work recall in the same operation those employees who have been laid off before engaging new help in those operations.

2. Employees in the plant shall not be assigned for any extended time to do the work normally done by other employees who are then on a lay-off.

3. If vacancies exist in sections other than those of the employees on layoff, the Employer shall give the employees on layoff opportunity to fill such vacancies before hiring new employees.

ARTICLE XX: FAIR EMPLOYMENT

The Employer shall not discriminate against any employee or applicant for employment because of race, creed, color, national origin, sex or age.

ARTICLE XXI: SHOP STANDARDS

1. Wages, piece rates, working standards and working conditions affecting earnings, hours, benefits, health, safety and efficiency now existing or hereafter established in the Employer's plants shall not be lowered.

2. The prevailing system of work, namely, time or piece work, shall not be changed during the term of this agreement, except by mutual agreement between the Union and the Employer.

3. Wages shall be paid weekly on a fixed day.

4. No homework shall be permitted.

5. The Employer shall comply with all the standards of sanitation and safety required by law.

6. The Employer shall not charge employees for damage to material unless caused negligently.

7. The Employer, in accordance with existing practice, shall furnish all tools incidental to work without charge to the employees.

8. The Employer shall send to the Union office monthly or give to a Union representative monthly a copy of its payroll for the last week of the preceding month, which shall show the craft and the straight-time and overtime hours and pay of each employee in the bargaining unit. The Employer shall also make available to the Union upon its request the data employed in setting wages or piece rates.

9. All new employees may be required to take a physical examination at the nearest ILGWU Health Center or Healthmobile.

ARTICLE XXII: DISCHARGES AND DISCIPLINE

No employee shall be discharged or otherwise disciplined without good and sufficient cause, except during his trial period. If the discharge or disciplinary act is found to be unjustified, the employee may be compensated for his loss of earnings during the period of such discharge or disciplinary act.

ARTICLE XXIII: CHAIRLADY—SHOP COMMITTEE

There shall be a Shop Chairlady and Shop Committee selected by or under the auspices of the Union. Pay-

ments to Shop Chairladies for time lost in adjusting grievances shall be in accordance with existing practice.

ARTICLE XXIV: STRUCK WORK

The Employer shall not perform any work for or give any work to any jobber, manufacturer, contractor, or sub-contractor engaged in the apparel and clothing industry against which a strike has been declared, and in no event shall it request any of its employees to perform work destined directly or indirectly for such concern. Such work shall not be deemed in the employees' regular course of employment, and the workers need not perform such work.

ARTICLE XXV: CROSSING PICKET LINE

To the extent permitted by law, it shall not be considered a breach of this agreement on the part of the Union or on the part of any individual employee if any employee or employees refuse to cross any picket line which relates to any worker employed at a plant covered by this agreement and which is recognized by the Union or to enter upon any such picketed premises of the Employer, either of their own volition or by direction of the Union, nor shall such refusal be cause for discharge or discipline.

ARTICLE XXVI: INDIVIDUAL CONTRACTS

The Employer shall not enter into any individual contracts with any of its employees covered by this agreement without prior Union approval.

ARTICLE XXVII: ACCESS TO SHOP— EXAMINATION OF BOOKS— NOTIFICATION

1. Representatives of the Union shall have access to the shop of the Employer for the purpose of taking up complaints and for the purpose of ascertaining whether the terms of this agreement are being complied with.

2. With regard to any matter covered by this agreement the Union may request the Employer to submit to a representative of the Union for examination such records and data as are pertinent or necessary in connection with the Employer's compliance with this agreement. Such request shall state the purpose for which the examination is sought. In the event of any dispute between the Employer and the Union concerning the records to be investigated or examined or concerning the scope of the examination, the matter may be referred by either party to the arbitrator hereunder.

3. The failure of the Employer to permit access to the shop or to submit such books and records shall be presumptive evidence of the violation complained of.

4. The Employer shall notify the Union monthly in writing of all new employees hired and of all employees terminated, in accordance with past practice.

ARTICLE XXVIII: UNION LABEL

The Employer shall affix an ILGWU Union Label to all garments manufactured in its plants and in the plants of its contractors, if any, in accordance as heretofore with the rules, regulations, and procedures promulgated by the International Ladies' Garment Workers' Union. The Em-

ployer shall purchase the labels from the Union at the same price and use them under the same terms and conditions as are applicable in the major market in the same branch of the garment industry in which the Employer is engaged.

ARTICLE XXIX: BENEFIT FUNDS

1.(a) The Employer shall pay weekly to the Union, or to affiliates or depositories designated by it, towards the appropriate health and welfare fund, a sum equivalent to the percentage set forth in the applicable plant supplemental agreement of its total gross weekly payroll (before deduction for federal or state taxes) due all employees (whether Union or non-Union employees) in the aforementioned bargaining unit (except such trial period employees who are then ineligible for benefits from such fund because they had not been previously employed in other bargaining units on whose behalf contributions had been made to such fund, the payment for whom shall be made retroactively to the inception of their employment by the Employer when they have passed their trial period). Such health and welfare fund shall be a trust fund established by collective agreement and maintained in trust for the purpose of providing employees with health, welfare and recreation benefits and services.

(b) The Employer shall at the same time and place make the following payments expressed as a percentage of said payroll to the ILGWU National Retirement Fund: Effective February 1, 1977 - 6%; Effective August 1, 1977 - 6.75%; one-eighth of one (.125%) percent of said payroll towards the Supplementary Unemployment Ben-

efits Fund, ILGWU; and three-eighths of one (.375%) percent towards the ILGWU Health Services Plan.

(c) If the Employer employs contractors of whatever kind to perform any apparel work (other than the application of trim or embroidery) for it, it shall, in addition, pay at the same time and place and for the same period to the Union, or to affiliates or depositories designated by the Union, towards said funds, a percentage of the total amount paid to or due to such contractors each week for such work, or, at the Union's option, a percentage of total gross wages as hereinbefore set forth of the employees employed by such contractors. The Union shall be at any time and any number of times in its sole discretion. The percentage of the total gross payroll shall be that set forth in the plant supplemental agreement of the Employer-owned plant which normally produces the same or similar work. If no such Employer-owned plant exists then the percentage of total gross payroll shall be that which prevails in the Union agreement in the major market where the same or similar work is produced. The percentage of the contractor's statement shall be arrived at by multiplying the applicable percentage contributions to such funds based on total gross payroll by .75. The foregoing payments shall be made toward the following funds in the proportions specified herein:

(i) the appropriate health and welfare fund;

(ii) the ILGWU National Retirement Fund; and

(iii) the Supplementary Unemployment Benefits Fund, ILGWU; and

(iv) the ILGWU Health Services Plan.

(d) The payments made hereunder by the Employer shall not constitute or be deemed wages due to the employees.

(e) The said funds shall be maintained and administered in accordance with the by-laws or rules and regulations adopted for that purpose. The Employer shall not have any legal or equitable right, title, claim or interest in or to said funds with respect to contributions made hereunder. No individual employee shall have any legal or equitable right, title or interest in or claim against (i) his or any other employer's payments toward the said funds, or (ii) said funds, except as may be provided by the by-laws or rules and regulations of said funds.

2. The ILGWU National Retirement Fund; the Supplementary Unemployment Benefits Fund, ILGWU; and the ILGWU Health Services Plan shall be administered by Boards of Trustees, the members of which shall be the trustees of said Funds. Said Boards of Trustees shall be composed of union representatives and an equal number of representatives of Employer-contributors to said Funds. If any Board of Trustees shall be deadlocked on any issue or matter arising in connection with the Fund which it administers, the same shall be decided by a neutral person as set forth in the by-laws or rules and regulations of said Fund, and his decision shall be final and binding. The parties hereby ratify, confirm and approve the composition and membership of the Boards of Trustees as now or hereafter constituted.

Each Board of Trustees shall adopt and promulgate such by-laws or rules and regulations to effectuate the purposes of the particular Fund which it administers as

it may deem necessary and desirable, including the detailed basis upon which payments from the Fund will be made, and shall have the power to modify the same from time to time. The parties hereto agree to be bound thereby and they are hereby incorporated in and made part of this agreement.

An annual audit of the ILGWU National Retirement Fund; the Supplementary Unemployment Benefits Fund, ILGWU; and the ILGWU Health Services Plan; shall be made by accountants designated by the body administering each Fund. A statement of the results of such audit shall be made available for inspection by interested persons at the principal office of the Funds and at such other places as may be designated by the body administering the particular Fund.

The monies paid towards the ILGWU National Retirement Fund; the Supplementary Unemployment Benefits Fund, ILGWU; and the ILGWU Health Services Plan shall not be used for any purpose other than to provide for pensions or annuities on retirement or death of employees, supplementary unemployment benefits and health services respectively and to pay the operating and administration expenses thereof. The monies of the said Funds shall be kept separate and apart from all other monies.

3. The Board of Trustees or other body administering any of the aforementioned funds is hereby authorized and empowered, in its sole discretion and upon such basis as it deems desirable, to transfer or mingle the assets of the said health and welfare fund or to merge said fund with any other health and welfare fund, or funds, said retirement fund with any other retirement fund or funds, said supplementary unemployment benefits fund with any

other supplementary unemployment benefits fund or funds, or said ILGWU Health Services Plan with any other health services plan as the case may be, now existing or hereafter established, and provided for in a collective bargaining agreement with the International Ladies' Garment Workers' Union or an affiliate thereof. In the event of such mingling, transfer, or merger, the amounts hereinabove provided to be allocated towards the respective funds shall thereafter be paid over to the fund or funds with which there has been such mingling, transfer or merger.

4. The Union, the Board of Trustees of any of the aforementioned funds, or either of them, shall be proper parties in interest to enforce collection of payments due from the Employer toward any Fund.

ARTICLE XXX: CONTRACTORS—
ADDITIONAL SHOPS—
MOVING—
INTEGRATED PRODUCTION

1. The Employer shall have no apparel work (which shall not include the application of trim or embroidery) performed outside of its own plants unless the workers of its inside plants are fully supplied with work, and unless such outside plant is under contract with a unit of the International Ladies' Garment Workers' Union and has complied with the terms thereof, is registered by the Employer with the Union herein, and maintains at least the standards of wages and hours established under agreement herein.

2. With respect to work (other than the application of trim or embroidery) done in contractors' plants for the Employer, the Employer shall be responsible to the em-

ployees employed in the contracting plants for (i) unpaid wages for two (2) payroll periods, (ii) holiday and vacation pay in the proportion that the Employer's work bears to the total work produced by the contractor in the holiday week or vacation year and (iii) to the appropriate unit of the International Ladies' Garment Workers' Union for dues and other monies due.

3. Should the Employer desire to expand or open an additional plant, notice thereof shall be given by said Employer to the Union prior to hiring any employees arising from the expansion or opening of such plant and such plant shall be operated under all the terms and conditions of this agreement. In no case, however, shall the expansion or opening of such plant result in reducing the work or the number of employees at present employed in the plants to which this agreement is now applicable.

4. The Employer agrees that during the term of this agreement it shall not move its plants from their present location if such removal requires any substantial increase in the distance to be travelled by its employees to the moved plant without prior negotiation and agreement on the removal between the parties hereto.

5. In order to safeguard working standards and employment opportunities of the employees covered by this and other agreements in the garment industry, it is agreed that all garments or parts thereof (not including the application of trim or embroidery) handled by the Employer during the term of this agreement, whether finished or partly finished, shall be manufactured exclusively either in its own plants or, as parts of an integrated process of production under the jobber contractor system of production, in a plant under contract with a unit of the Inter-

national Ladies' Garment Workers' Union and accordingly the Employer shall not handle, purchase, import or otherwise obtain, directly or indirectly, any other wholly or partly finished garments whatsoever (not including the application of trim or embroidery) during the term of this agreement.

ARTICLE XXXI: SUBSIDIARY, AUXILIARY OR AFFILIATED FIRMS

1. Subsidiary, auxiliary or affiliated apparel firms or corporations shall, for the purpose of this agreement, be deemed bound by all the terms of this agreement. The arbitrator selected as provided in ARTICLE XXXVIII shall have the right and power to determine whether an alleged subsidiary, auxiliary, or affiliate of the Employer is such subsidiary, auxiliary or affiliate, and shall be guided by the proof of facts tending to establish any connection or interest, direct or indirect, between them or tending to establish a plan, scheme or device on the part of the Employer to avoid or evade the provisions of this agreement by or through such subsidiary, auxiliary or affiliate.

2. The Employer shall not enter into any partnership or consolidate or merge with another person, firm or corporation in the industry, unless the new firm assumes all accrued obligations to the workers covered by this agreement, the Union, and the Funds towards which payments are required under ARTICLE XXIX.

ARTICLE XXXII: NEW PRODUCTS

If the Employer at any time makes garments in any branch of the garment industry other than or in addition

to the branch in which the Employer is presently engaged, the Union at its option may forthwith renegotiate the terms of this agreement with respect to such garments. In the event of any disagreement concerning the new terms, the no-strike, no-stoppage obligations under ARTICLE XXXVII shall be suspended and of no force and effect.

ARTICLE XXXIII: MAINTENANCE OF LEVEL OF EMPLOYMENT

1. The Employer agrees that the acquisition of plants after January 31, 1971 and the expansion of such plants shall not result in a reduction of employment or straight-time earnings for employees in the bargaining unit in the Employer owned plants in existence on January 31, 1968. To this end—and with respect only to plants making similar or related products—the approximate number of employees in each existing plant on January 31, 1968 shall be maintained to the extent possible if a reduction in the Employer's total work force in such existing and newly acquired plants takes place.

2. If the Employer expands its production of similar or related products, such expansion shall not be limited to such new plants but shall be shared as equally and equitably as possible with employees in existing plants producing or able to produce such products.

ARTICLE XXXIV: NON-PAYMENTS

1. Notwithstanding ARTICLES XXXVII and XXXVIII or any other provision of this agreement, if the Employer fails for five (5) days to pay in full any wages due to the workers covered by this agreement, any dues

or other monies due to the Union, any payments due under ARTICLE XXX, or any payments due towards the Fund as provided in ARTICLE XXIX, the Union may immediately direct the workers to discontinue work until all sums due have been paid in full. This right shall be in addition to all other remedies available to the Union.

2. In the event of any breach of this agreement by the Employer (including any non-payment by the Employer of sums due to any employees for wages, holiday pay, or otherwise), the Union in its own name shall be a proper party in interest to enforce compliance by the Employer with this agreement on the Union's own behalf and on behalf of any affected employee without further assignments or authorizations from them.

ARTICLE XXXV: LIQUIDATED DAMAGES FOR VIOLATIONS

1. Should the Employer have any work performed in a non-ILGWU plant in violation of ARTICLE XXX, the parties agree that such violation would result in damaging the interest of the employees represented by the Union and of the Union itself in the establishment and maintenance of the labor standards provided in this agreement. The parties also agree the specific amount of damage to the Union upon such violation is difficult, if not impossible, to ascertain. Therefore it is agreed that upon such violation the Employer shall pay twenty (20%) per cent of the contractor's statement without any offsetting credits.

2. Should the parties agree upon liquidated damages for any other breach of this agreement, the same shall be paid to the Union in full discharge for the Employer's

liability for said breach. If the parties are unable to agree upon the amount of liquidated damages for a breach of this agreement the matter shall be treated as a dispute subject to arbitration. Nothing in the aforesaid shall be deemed to limit or add to such powers as the arbitrator may now have. The foregoing liquidated damages shall be in addition to all other remedies available to the Union and the employees.

3. Nothing in the aforesaid shall be deemed to limit or add to such powers as the arbitrator may now have.

ARTICLE XXXVI: AGENCY

The Employer agrees that the sole persons authorized or having the power to act as agents of the Union, or to bind the Union legally with respect to matters arising out of this agreement or arising out of the relations between the Employer and the Union, or to subject the Union to any liability whatever by reason of any act or omission are the Manager of the local union and the designated Business Agent servicing the shop (or such substitute or additional persons as the Union may hereafter formally designate by written notice to the Employer). The Union shall not be responsible for the acts or omissions of any other person, including members and employees of the Union.

ARTICLE XXXVII: NO STRIKE, NO LOCKOUT PLEDGES

The Union agrees that it will not call, authorize or ratify a strike or stoppage during the life of this agreement, except for the Employer's failure to submit to arbitration

or to comply with the decision of an arbitrator. Should any strike or stoppage occur, the Union's sole obligation shall be to endeavor in good faith, within twenty-four (24) hours after receipt of written notice thereof from the Employer, to bring about the return to their work of its members who have stopped work. Upon the failure of any employees to return to work within said twenty-four (24) hour period, the Employer may at its option consider that such employees have abandoned their employment; but should the Employer reemploy such employees, it shall treat all such employees alike and shall not discriminate against or among them. Compliance by the Union in good faith with this provision shall be deemed full compliance with the Union's obligation hereunder.

The foregoing no-strike, no-stoppage obligations shall be wholly suspended and of no force and effect, and the Union may call, authorize or ratify a strike or stoppage, during the continuance of any strike or stoppage (not in violation of contract) declared by the International Ladies' Garment Workers' Union or any unit thereof at any plant of any firm which is directly or indirectly affiliated with or related to the Employer herein.

The Employer agrees that it will not order, authorize or ratify a lockout during the life of this agreement. Should any lockout occur, the Employer's sole obligation shall be to endeavor in good faith, within twenty-four (24) hours after receipt of written notice thereof from the Union, to terminate the lockout and to reemploy the employees. Upon the failure of the Employer to do so within said twenty-four (24) hour period, the Union at its option may treat the matter as a dispute under ARTICLE XXXVIII, or may consider that the Employer has forfeited its rights under the agreement.

ARTICLE XXXVIII: ADJUSTMENT MACHINERY— COURT ACTIONS BARRED

1. Any and all disputes, complaints, controversies, claims or grievances whatsoever between the Union or any employees and the Employer or any person responsible under ARTICLE XXXIV which directly or indirectly arise under, out of, or in connection with or in any manner relate to this agreement or the breach thereof, or the acts, conduct or relations between the parties shall be adjusted as follows:

(a) The Shop Chairlady or in the case of piece rate disputes the Shop Committee, together with a representative of the Union, shall attempt to settle the matter with a representative of the Employer. No adjustment shall be deemed binding on the Union unless approved by an authorized representative thereof.

(b) If they shall fail satisfactorily to dispose of any such dispute, complaint, controversy, claim or grievance, or if for any reason it has not been taken up by them, or if the matter does not lend itself to the foregoing procedure, the matter shall be submitted to arbitration before Mr. David L. Cole as arbitrator. If the Arbitrator shall, in his sole discretion, decide not to hear personally a particular case, he shall designate a substitute arbitrator to hear the case. The substitute arbitrator shall have the same rights and powers as the arbitrator with regard to the particular case for which he has been designated. Should the arbitrator resign, refuse to act or be incapable of acting or should the office become vacant for any other reason, the parties shall within five (5) days from the occurrence of any of these events agree upon and designate another person to act as arbitrator. Upon failure by the parties to agree, the arbitrator shall be selected through

the machinery of the Federal Mediation and Conciliation Service in accordance with its rules.

(c) The award or decision of the arbitrator, in addition to granting such other relief as the arbitrator may deem proper may contain provisions commanding or restraining acts and conduct of the parties. If either party shall default in appearing before the arbitrator, he is empowered nevertheless to take the proof of the party appearing and render an award thereon. Any award or decision of the arbitrator shall be final and binding and shall be enforceable by appropriate proceedings at law or in equity. The taking of the oath by the arbitrator is hereby expressly waived. His fee shall be borne equally by the parties hereto.

(d) Any papers, notices or processes to initiate or continue an arbitration hereunder, and all papers, notices or processes in any application to a court to confirm or enforce an arbitration award hereunder, including service of the papers conferring jurisdiction of the parties upon the court, may be served by registered mail directed to the last known address of the Employer or the Union.

2. The procedure herein established for the adjustment of disputes shall be the exclusive means for the determination of all disputes, complaints, controversies, claims or grievances whatsoever, including the arbitrability of any dispute, and including claims based upon any breach of the no-strike, no-stoppage pledges of this agreement or upon any other breach of this agreement. It is intended that this provision shall be interpreted as broadly and inclusively as possible. Neither party shall institute any action or proceeding in a court of law or equity, state or Federal, or before an administrative tribunal, other than to compel arbitration, as provided in this agreement, or

with respect to the award of an arbitrator. This provision shall be a complete defense to and also ground for a stay of any action or proceeding instituted contrary to this agreement.

3. Any dispute, complaint, controversy, claim or grievance which any employee may have against the Employer may be instituted and processed only by the Union in the manner herein provided. No employee shall have the right individually to institute or process any action or proceeding with reference to any dispute, complaint, controversy, claim or grievance; or to initiate or compel arbitration in the event the Union fails or refuses to proceed with arbitration.

ARTICLE XXXIX: ADDITIONAL PROVISIONS

The provision contained in the plant supplemental agreements shall constitute part of this agreement and be subject to all of its terms. Where a plant supplemental agreement provides terms which differ from those of this Master Agreement the provisions of the plant supplemental agreement shall govern.

No agreement or understanding which changes, varies or modifies any provision of this Master Agreement or of any plant supplemental agreement shall be binding upon the Union unless it is duly executed by or received prior approval from the President of the International Ladies' Garment Workers' Union or the Union's National Administrator of this agreement.

ARTICLE XL: CONFORMITY TO LAW— SAVING CLAUSE

1. If any provision or the enforcement or performance of any provision of this agreement or any supple-

mental agreement is or shall at any time be contrary to law, then such provision shall not be applicable or enforced or performed, except to the extent permitted by law. If at any time thereafter such provision or its enforcement or performance shall no longer conflict with the law, then it shall be deemed restored in full force and effect as if it had never been in conflict with the law.

2. If any provision of this agreement or any supplemental agreement or the application of such provision to any person or circumstance shall be held invalid, the remainder thereof or the application of such provision to other persons or circumstances, shall not be affected thereby.

ARTICLE XLI: TERM

This agreement shall go into effect as of February 1, 1977 and shall continue in effect with respect to both plants until January 31, 1980.

IN WITNESS WHEREOF, the parties have caused this agreement to be signed the day and year first above written.

THE BARBIZON CORPORATION
BARBIZON OF UTAH, INC.

By /s/ Anthony B. Ritter, Ex. V.P.
(Name and Title)

INTERNATIONAL LADIES'
GARMENT WORKERS'
UNION

By /s/ Wilber Daniels, Ex. V.P.
(Name and Title)

APPENDIX U

THE BARBIZON CORPORATION

with

THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION

Supplemental Agreement For
Montville, New Jersey Plant

effective February 1, 1980—January 31, 1983

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THIS SUPPLEMENTAL AGREEMENT made and entered into as of February 1, 1980 between the BARBIZON CORPORATION, hereinafter designated as the "Employer" and the INTERNATIONAL LADIES' GARMENT WORKERS' UNION, hereinafter designated as the "Union."

WHEREAS, the Barbizon Corporation and the International Ladies' Garment Workers' Union have heretofore entered into an agreement effective as of February 1, 1980, with respect to the Employer's plant in Montville, New Jersey, hereinafter referred to as the "Master Agreement," and have reached agreement on additional terms applicable to said plant;

NOW, THEREFORE, in consideration of the mutual promises and obligations herein made and assumed, the parties agree as follows:

1. *Plant covered*

This supplemental agreement shall be applicable to the Employer's plant in Montville, New Jersey. This agreement shall be supplementary to and shall be deemed part of the Master Agreement. The terms and conditions of the Master Agreement as specifically supplemented and modified herein for the Montville, New Jersey plant shall be applicable to that plant.

2. *Hours* (Re: ARTICLE VI of Master Agreement)

The daily regular hours shall be 8:00 a.m. to 3:30 p.m. with one-half (1/2) of one hour for lunch. All work outside the daily regular hours or over seven (7) hours in one (1) day or over thirty-five (35) hours in one week or on Saturday shall be considered overtime and shall

be paid for at the rate of time and one-half and in the event of Sunday work, double time. Overtime work shall not be pyramided. No employee shall be required to work any additional overtime after seven and one-half (7-1/2) hours of work Mondays through Fridays. Additional overtime shall be permitted on Saturdays and Sundays, but employees shall not be compelled to work additional overtime on Saturdays or Sundays.

3. *Minimum wages* (Re: ARTICLE IX of Master Agreement)

(a) Craft minimum wages shall be no less than the following rates per hour:

	effective	
craft	6/29/81	2/1/82
packers, order pickers, checkers	$4.40	$4.75
service floor workers	$3.88	$4.19
sample makers	$5.20	$5.62

(b) The progression schedule for newly hired inexperienced employees shall be the following:

	effective	
length of employment	6/29/81	2/1/82
packers, order pickers, checkers		
after 8 weeks	$4.25	$4.59
after 12 weeks	$4.40	$4.75

(c) All other inexperienced employees shall receive their craft minimum wages after eight (8) weeks of employment.

(d) If the trial period is extended under Section 1 of ARTICLE V of the Master Agreement in an individual case, the application of the above progression schedules to such case shall be negotiated by the Union and the Employer.

4. *Wage increases* (Re: ARTICLE VII of Master Agreement)

Following are the general wage increases for all employees:

(a) 5% effective February 4, 1980 added to their then applicable wages.

(b) An additional 5% effective April 28, 1980 added to their then applicable wages.

(c) An additional 8% effective February 2, 1981 added to their then applicable wages.

(d) (i) Effective February 1, 1982, all employees hired before June 29, 1981 shall receive an additional wage increase of 53¢ per hour.

(ii) The wage increase effective February 1, 1982 for all employees hired on or after June 29, 1981, shall be calculated by computing 8% of the average of the total hourly wage rates as of July 13, 1981, of all employees hired on or after June 29, 1981, in the same crafts. Thus, for example, if there are 10 such packers, order pickers and checkers employed, and the totals of their hourly wage rates as of July 13, 1981 equals $44, then their average wage is $4.40 and the wage increase for such packers, order pickers and checkers shall be 36¢ per hour (8% of $4.40).

5. *Holidays* (Re: ARTICLE XII of Master Agreement)

(a) All eligible employees shall receive the following holidays and after June 29, 1981 shall be paid therefor at their regular straight time daily rate of pay. All holidays prior to June 29, 1981, shall be paid according to the method set forth in the previous Agreement.

The following are the holidays:

New Year's Day
George Washington's Birthday
Good Friday
Memorial Day
Independence Day
Labor Day
Thanksgiving Day
Day after Thanksgiving
Christmas Day
Last Working Day before Christmas
Election Day (effective 1981)

(b) A holiday falling on a Saturday or Sunday shall be celebrated on the prior Friday or following Monday, respectively.

6. *Vacation and Length of Service Payment* (Re: ARTICLE XIII of Master Agreement)

(a) Prior to June 29, 1981, employees shall receive from the Employer the following vacation days with pay:

Length of Employment	Paid Days Off
6 months but less than 7 months	3 days
7 months but less than 1 year	5 days
1 year but less than 2 years	7–1/2 days
2 years but less than 3 years	10 days
3 years but less than 5 years	10 days
5 years but less than 8 years	11 days
8 years but less than 10 years	12 days
10 years but less than 15 years	13 days
15 years but less than 20 years	14 days
20 years but less than 22 years	15 days
22 years but less than 25 years	16 days
25 years but less than 26 years	17 days
26 years and over	20 days

(b) Effective June 29, 1981, employees shall receive from the Employer the following vacation days with pay:

Length of Employment	Paid Days Off
6 months but less than 7 months	3 days
7 months but less than 1 year	5 days
1 year but less than 2 years	8 days
2 years but less than 5 years	10 days
5 years but less than 10 years	12 days
10 years but less than 15 years	13 days
15 years but less than 20 years	15 days
20 years and over	20 days

(c) In addition to the vacation pay stipulated in Sections 5(a) and (b) above, an employee employed

two (2) years or more on December 1 of each year, shall receive on December 15 a length of service payment of two (2%) per cent of his/her gross earnings in the last four (4) completed calendar quarters. Commencing 1981, employees employed five (5) but less than ten (10) years shall receive 3% of his/her gross earnings in the last four (4) completed calendar quarters, and an employee employed ten (10) years or more shall receive 4% of his/her gross earnings in the last four (4) completed calendar quarters. An employee employed twenty (20) years or more on December 1 of each year shall in no event receive less than a week's pay.

Fully eligible employees terminated prior to December 1st shall, within thirty (30) days after termination be paid their pro-rata length-of-service payment based on total earnings since November 1st of the preceding calendar year.

A medical leave of up to three (3) months after the first year of employment shall be counted toward the length-of-service requirement and shall not break length-of-service for vacation purposes.

(d) Paid vacations up to and including the first two (2) weeks (comprising ten (10) days) shall take place during July and August of each year at the convenience of the Employer. The Employer may continue to close its plant during the first week of July or the first two (2) weeks in July as it has done for many years in the past. The Employer at its option may require the third week of paid vacation to be taken between Christmas and New Year's. The fourth week's vacation for those so entitled shall be taken at a time mutually agreed upon by the parties. A worker shall not be denied desired time off except for production requirements only.

(e) June 1st of each year shall be the date at which service eligibility shall be determined and computed for paid vacation.

(f) Vacation pay for a time worker shall be based on his/her regular weekly wage. Effective June 29, 1981, vacation pay for all employees shall be based on his/her regular straight time weekly wage (hourly rate of pay multiplied by 35 hours).

(g) Any employee who leaves his employment for good reason or whose employment is terminated involuntarily prior to the beginning of vacation period shall then be entitled to receive his pro-rata vacation pay from the Employer corresponding to the fractional portion of the twelve (12) month period preceding such distribution during which he/she worked for the Employer.

(h) If work is required during the vacation shutdown period, the Employer will offer the opportunity to perform such work on the basis of seniority among those qualified.

7. *Assignment to other work* (Re: ARTICLE XV of Master Agreement)

An employee who is requested to perform work other than his regular work while his regular work is unavailable shall receive for such work either the established time rates therefor or his/her average hourly earnings during his last four (4) weeks of full employment on his regular work, whichever are greater.

8. *Samples*

Supervisors will not make samples except for training purposes and in emergency situations.

9. *Seniority* (Re: ARTICLE XIX of Master Agreement)

(a) The Employer will make good faith efforts to recall employees on lay-off for part-time work before hiring temporary part-timers.

(b) An employee on medical leave of absence of up to three (3) months shall, upon thirty (30) days' notice of intended return date, be reassigned to his/her regular job.

10. *Benefit Funds* (Re: ARTICLE XXIX of Master Agreement)

(a) The percentage contribution provided in Section 1(a) of ARTICLE XXIX of the Master Agreement shall be six and one-half (6-1/2%) per cent towards the Health and Welfare Fund of the Eastern Region, ILGWU.

(b) The percentage contribution provided in Section 1(b) of ARTICLE XXIX of the Master Agreement towards the ILGWU National Retirement Fund shall be six and three quarters (6-3/4%) per cent. Effective June 29, 1981, this percentage shall be increased to eight (8%) per cent. Effective June 28, 1982, this percentage shall be increased to eight and one-half (8-1/2%) per cent. Effective January 3, 1983, this percentage shall be increased to eight and three-quarters (8-3/4%) per cent. If the Lingerie Manufacturers Association of New York, Inc. increases the rate of contribution to more than 8-3/4% before termination of this Agreement, the contribution under this Agreement shall at the same time also be increased a like amount, but to no more than 9%.

(c) The percentage contribution provided in Section 1(b) of ARTICLE XXIX of the Master Agreement towards the ILGWU Health Services Plan shall be one-half of one (.50%) per cent. Effective June 29, 1981, this percentage shall be increased to seven-eighths of one (.875%) per cent.

11. *Term* (Re: ARTICLE XL of Master Agreement)

This Supplemental Agreement shall be effective as of February 1, 1980 and shall terminate on the same date as set forth in Article XL of the Master Agreement.

IN WITNESS WHEREOF, the parties have caused this Agreement to be signed by their respective officers on the day and year first above written.

THE BARBIZON CORPORATION

By Anthony B. Ritter, Pres.
(Name and Title)

LOCAL 161 OF INTERNATIONAL LADIES' GARMENT WORKERS' UNION

By .....
(Name and Title)

INTERNATIONAL LADIES' GARMENT WORKERS' UNION

By Wilbur Daniels, Ex. V.P.
(Name and Title)

NEW JERSEY REGION OF INTERNATIONAL LADIES' GARMENT WORKERS' UNION

By .....
(Name and Title)

APPENDIX V

MASTER AGREEMENT

THIS AGREEMENT made and entered into as of February 1, 1980, by and between THE BARBIZON CORPORATION, with a plant located in Montville, New Jersey, hereinafter designated as the "Employer", and the INTERNATIONAL LADIES' GARMENT WORKERS' UNION, an unincorporated association, hereinafter designated as the "Union", for and in behalf of itself, such of its affiliates as are or may become parties to agreements with the Employer and the employees now employed or hereafter to be employed by the Employer.

WITNESSETH:

WHEREAS, the Employer represents that it is engaged in the apparel and clothing industry; and

WHEREAS, the workers employed by the Employer have duly designated the Union as their exclusive bargaining representative for the purpose of collective bargaining with the Employer with respect to rates of pay, wages, hours and other conditions of employment; and

WHEREAS, the parties desire to cooperate in establishing conditions which will tend to secure a living wage and improved working conditions, and to provide methods for a fair and peaceful adjustment of all disputes that may arise between the parties;

NOW, THEREFORE, in consideration of the mutual promises and obligations herein assumed and contained, and other good and valuable considerations, the parties agree as follows:

ARTICLE I: MUTUAL OBLIGATIONS

The parties agree that this Agreement shall be binding upon them and their respective transferees, successors, and assigns, and that they will faithfully comply with its provisions. The Employer agrees that no sale or transfer of its assets or stock shall be made except to a purchaser or transferee who takes subject to and agrees to be fully bound by the terms of this agreement except as otherwise agreed by the parties. The Employer shall continue to be liable for the performance of this agreement until such purchaser or transferee expressly in writing agrees to be so bound. Thereafter the Employer shall be discharged from any liability or obligation accruing under the agreement on and after the date of assumption of such responsibility by such purchaser or transferee.

ARTICLE II: UNION RECOGNITION

The bargaining unit covered by this agreement consists of all non-supervisory production, floor, packing, and shipping workers employed by the Employer, hereinafter referred to as "employees". It is agreed that the Union represents a majority of such employees and that it shall be the sole and exclusive bargaining representative for all employees in the bargaining unit during the entire period of this agreement. Neither the Employer nor any of its agents shall directly or indirectly discourage membership in the Union.

ARTICLE III: UNION MEMBERSHIP

The Employer agrees to employ and retain in its employ none but those who are or who become and remain members in good standing of the Union on and after the

thirtieth (30th) day following the beginning of their employment or the execution or effective date of this agreement, whichever is the later. However, all new employees whose trial period under ARTICLE V is longer than said thirty (30) days shall be required to become and remain members in good standing of the Union immediately after the completion of said trial period.

ARTICLE IV: CHECK-OFF

The Employer agrees to deduct membership dues (which shall be deemed to include periodic fixed dues, initiation fees, and assessments) from the earnings of its employees monthly and transmit the same to the Union or its designee promptly thereafter, subject to the requirements of law concerning authorization and assignment by the workers individually.

ARTICLE V: TRIAL PERIOD

1. The trial period for newly hired employees shall be for:

experienced hourly employees .....thirty (30) days;
inexperienced hourly employees ....eight (8) weeks;
piece work employees .....eight (8) weeks.

However, the trial period for a piece work employee who earned the contract minimum (a) at the end of two (2) weeks shall be shortened to two (2) weeks, (b) at the end of three (3) weeks shall be shortened to three (3) weeks or (c) at the end of four (4) weeks shall be shortened to four (4) weeks. In individual cases the trial period may be extended upon the consent of the Union, which consent shall not be unreasonably withheld.

2. An employee may, during his trial period, be discharged without regard to cause.

ARTICLE VI: HOURS—OVERTIME

The standard hours of employment shall be thirty-five (35) hours per week divided equally into the first five (5) working days. All work outside the daily regular hours shall be considered overtime and shall be paid for at the rate of time and one-half. Saturday work as such shall be considered overtime and shall be paid for at the rate of time and one-half. Overtime shall not be pyramided. Conditions for working of overtime may be set forth in plant supplemental agreements.

ARTICLE VII: WAGE INCREASES

Each employee shall receive the general wage increases set forth in the applicable plant supplemental agreement.

ARTICLE VIII: RISE IN COST OF LIVING

If a cost of living increase is given by the women's intimate apparel industry in the New York Negotiation Area under contract with Local 62, I.L.G.W.U. or by direction of an arbitrator, the same increase shall be given on the same effective date to all employees covered by this Agreement. In no event, however, shall the total percentage increase in the third contract year of this Agreement, including any scheduled wage increases and cost of living increase, given during that period be greater than or less than the total of such increase given in the second contract year under the applicable agreement between Local 62-32 and the Lingerie Manufacturers Association of N.Y.C., Inc., dated July 1, 1981.

Any wage increase under this ARTICLE shall not affect the rights of the employees as to the general wage increases provided in this agreement and said general wage

increases shall not affect the right of employees to any increase under this ARTICLE, except as modified in the proceeding Paragraph.

Should the Employer and the Union fail to agree upon wage increases under this ARTICLE, the matter shall be deemed a dispute under ARTICLE XXXVIII.

ARTICLE IX: MINIMUM WAGES

1. Craft minimum hourly wages shall be those set forth in the plant supplemental agreements.

2. If an entire section of piece workers is changed to a time work basis for more than a temporary period, minimums for such section shall be twenty (20%) per cent above the applicable craft minimums set forth in the plant supplemental agreement.

ARTICLE X: CHANGE IN LEGAL MINIMUMS

Effective February 1, 1981, should legislation be enacted increasing minimum wages under the law the minimum wages under this agreement shall not be less than fifteen (15%) percent above said legal minimum. Upon such increase in minimum wages, corresponding increases shall be made in the piece rate and wage structure of the plant.

ARTICLE XI: PIECE RATES

1. Piece rates on each operation shall be set so as to yield piece work employees working under average conditions the percentage above their craft minimums set forth in the plant supplemental agreements. Piece rates shall take into account time required by employees to prepare production slips and other clerical work.

2. In the determination of whether a new piece rate has been properly set each new piece rate shall be separately considered.

3. When a new piece rate is announced to piece work employees it shall be immediately followed by a job description specifying the production methods to be applied. This description must be kept on file in the plan and be made available upon request.

4. When piece rates are settled, such raises shall be retroactive to the inception of the work.

5. Retroactive payments for adjusted piece rates shall be listed on the pay check or envelope separately together with the period for which such retroactive payment is made.

6. When a piece rate is questioned by a Union representative, the Union shall have the right to initiate its own investigation. Upon notice to the Employer, the Union and the Employer shall arrange a mutually agreeable date for a Union engineer and Company engineer to investigate the rate. If they cannot reach such an agreement within three (3) days, the Union engineer may conduct his investigation of the complaint submitted by the Union representative without the presence of a Company engineer.

ARTICLE XII: HOLIDAYS

1. The holidays set forth in the plant supplemental agreements shall be observed and all employees, whether time or piece workers, shall be paid a full day's pay for them in any event and regardless of whether such holidays fall on a working day or non-working day of the week or in any non-working week. An employee shall be eli-

gible for holiday pay provided that, while work is available, he works both the full working day before and the full working day after the holiday, unless his absence is for sufficient cause.

2. Holiday pay for each piece worker shall be based upon his average earnings during the period set forth in the plant supplemental agreements.

3. If work is performed on any such holiday, it shall be paid for at the rate of time and one-half in addition to holiday pay.

4. If any such holiday occurs during a vacation shutdown, employees eligible to receive holiday pay shall receive one (1) additional day off with holiday pay as provided in paragraph 1 above.

ARTICLE XIII: VACATIONS

Provision for vacations shall be as set forth in the plant supplemental agreements.

ARTICLE XIV: DISTRIBUTION OF WORK

1. At all times available work shall be distributed among qualified employees as equally as possible.

2. No member of the Employer or supervisory employee or designer or any other person outside the bargaining unit shall perform any work in any job covered by this agreement except in an emergency situation where such work is for less than one-half (1/2) day.

3. If an employee has been laid off and any member of the Employer or supervisory employee or designer or any other person outside the bargaining unit does his work, the Employer shall reimburse the employee so laid

off for his loss of earnings and shall immediately reemploy him.

ARTICLE XV: ASSIGNMENT TO OTHER WORK

1. An employee who is requested to perform work other than his regular work while his regular work is available shall receive for such other work his average hourly earnings in his regular work as set forth in this plant supplemental agreements or his earnings in the new work, whichever are greater.

2. An employee whose regular work is unavailable and who is requested to perform other work shall be paid as set forth in the plant supplemental agreements.

ARTICLE XVI: MACHINE BREAKDOWN

A piece work employee shall be paid for all time lost through machine breakdown in excess of fifteen (15) minutes in accordance with previous practice.

Where an employee is responsible for excessive machine repairs, he may be reimbursed for such lost time on terms differing from the above in joint consultation with the Union.

Where an employee's machine may be down for more than fifteen (15) minutes, the Employer may assign him to another similar machine until his own machine is in working order again.

ARTICLE XVII: CALL-IN TIME

All employees who are requested to report for work shall be supplied with at least one-half (1/2) day's continuous work or be paid therefor at their average hourly

earnings during the base periods presently used in each shop. Employees who are required to remain for any period thereafter shall be supplied with a normal flow of work or be paid for such period at said average hourly earnings.

ARTICLE XVIII: JOB RIGHTS—ILLNESS—MATERNITY LEAVE—LEAVE OF ABSENCE

1. No employee shall absent himself without sufficient reason. If he has absented himself without sufficient reason and the Employer requests his return and supplies his name and address, the Union shall return him to work within three (3) days after receipt of such request. If he does not return within such three (3) days, the Employer may terminate his employment. Nothing herein contained shall be deemed to limit or prevent the Employer from discharging an employee for excessive absenteeism.

If an employee who has absented himself with or without sufficient reason returns to work, he shall be entitled to his regular job last performed prior to such absence. If such job is not then being performed, he shall be entitled to any other available job with entitlement to his regular job when it is resumed.

2. One (1) year of maternity leave shall be granted to an employee after twelve (12) months' service. Such employee shall return to the same position at the prevailing rate for that position with seniority rights unimpaired at the termination of the leave.

The employee will undertake to give the Employer at least one (1) month's advance notice of the specific date of leaving.

Continual absence from work at the end of the twelve (12) month leave will be just cause for dismissal.

Time spent on such leave of absence shall not count as time worked for the purpose of computing unbroken service.

3. An employee who has been employed for one (1) or more years may request a leave of absence and the Employer shall not unreasonably refuse such request. If such request is granted and the employee overstays the authorized leave period, the Employer may impose a penalty of loss of one (1) day's vacation pay for each week of such unauthorized absence. The Employer may resort to subdivision 1 where such unauthorized absence is of unreasonable duration.

4. An employee shall be granted three (3) consecutive working days off with pay upon the death of a husband, wife, child, stepchild, parent, parent-in-law, guardian, grandparent, grandchildren, daughters-in-law, sons-in-law, brother or sister. Such pay shall be based upon the employee's regular hourly rate; or for a piece worker upon his average straight-time hourly earnings during the period set-forth in each plant supplemental agreement.

5. An employee shall be paid for time off for jury duty for a maximum of four (4) weeks. Such pay shall be the difference between jury pay and the employee's regular hourly rate, or for a piece worker, his average straight-time hourly earnings during the period set forth in each supplemental agreement.

ARTICLE XIX: RECALL AFTER LAY-OFF— JOB OPENINGS

1. If the Employer lays off employees during the slow season, it shall upon resuming work recall in the same operation those employees who have been laid off before engaging new help in those operations.

2. Employees in the plant shall not be assigned for any extended time to do the work normally done by by other employees who are then on a lay-off.

3. If vacancies exist in sections other than those of the employees on layoff, the Employer shall give the employees on layoff opportunity to fill such vacancies before hiring new employees.

ARTICLE XX: FAIR EMPLOYMENT PRACTICES

The Employer shall not discriminate against any employee or applicant for employment who is a member of a protected class under applicable Local, State or Federal Antidiscrimination statutes.

ARTICLE XXI: SHOP STANDARDS

1. Wages, piece rates, working standards and working conditions affecting earnings, hours, benefits, health, safety and efficiency now existing or hereafter established in the Employer's plants shall not be lowered.

2. The prevailing system of work, namely, time or piece work, shall not be changed during the term of this agreement, except by mutual agreement between the Union and the Employer.

3. Wages shall be paid weekly on a fixed day.

4. No homework shall be permitted.

5. The Employer shall comply with all the standards of sanitation and safety required by law.

6. The Employer shall not charge employees for damage to material unless caused negligently.

7. The Employer, in accordance with existing practice, shall furnish all tools incidental to work without charge to the employees.

8. The Employer shall send to the Union office monthly or give to a Union representative monthly a copy of its payroll for the last week of the preceding month, which shall show the craft and the straight-time and overtime hours and pay of each employee in the bargaining unit. The Employer shall also make available to the Union upon its request the data employed in setting wages or piece rates.

9. All new employees may be required to take a physical examination at the nearest ILGWU Center or Healthmobile.

ARTICLE XXII: DISCHARGES AND DISCIPLINE

No employee shall be discharged or otherwise disciplined without good and sufficient cause, except during his trial period. If the discharge or disciplinary act is found to be unjustified, the employee may be compensated for his loss of earnings during the period of such discharge or disciplinary suspension.

ARTICLE XXIII: CHAIRPERSON—SHOP COMMITTEE

There shall be a Shop Chairperson and Shop Committee selected by or under the auspices of the Union. Payments

to Shop Chairperson for time lost in adjusting grievances shall be in accordance with existing practice.

ARTICLE XXIV: STRUCK WORK

The Employer shall not perform any work for or give any work to any jobber, manufacturer, contractor, or subcontractor engaged in the apparel and clothing industry against which a strike has been declared, and in no event shall it request any of its employees to perform work destined directly or indirectly for such concern. Such work shall not be deemed in the employee's regular course of employment, and the workers need not perform such work.

ARTICLE XXV: CROSSING PICKET LINE

To the extent permitted by law, it shall not be considered a breach of this agreement on the part of the Union or on the part of any individual employee if any employee or employees refuse to cross any picket line which relates to any worker employed at a plant covered by this agreement and which is recognized by the Union or to enter upon any such picketed premises of the Employer, either of their own volition or by direction of the Union, nor shall such refusal be cause for discharge or discipline.

ARTICLE XXVI: INDIVIDUAL CONTRACTS

The Employer shall not enter into any individual contracts with any of its employees covered by this agreement without prior Union approval.

ARTICLE XXVII: ACCESS TO SHOP—EXAMINATION OF BOOKS—NOTIFICATION

1. Representatives of the Union shall have access to the shop of the Employer for the purpose of taking up complaints and for the purpose of ascertaining whether the terms of this agreement are being complied with.

2. With regard to any matter covered by this agreement the Union may request the Employer to submit to a representative of the Union for examination such records and data as are pertinent or necessary in connection with the Employer's compliance with this agreement. Such request shall state the purpose for which the examination is sought. In the event of any dispute between the Employer and the Union concerning the records to be investigated or examined or concerning the scope of the examination, the matter may be referred by either party to the arbitrator hereunder.

3. The failure of the Employer to permit access to the shop or to submit such books and records shall be presumptive evidence of the violation complained of.

4. The Employer shall notify the Union monthly in writing of all new employees hired and of all employees terminated, in accordance with past practice.

ARTICLE XXVIII: UNION LABEL

The Employer shall affix an ILGWU Union Label as per industry practice in a location on all garments manufactured in its plants and in the plants of its contractors, if any, in accordance as heretofore with the rules, regulations, and procedures promulgated by the International Ladies' Garment Workers' Union. The Employer shall

purchase the labels from the Union at the same price and use them under the same terms and conditions as are applicable in the major market in the same branch of the garment industry in which the Employer is engaged.

ARTICLE XXIX: BENEFIT FUNDS

1.(a) The Employer shall pay weekly to the Union, or to affiliates or depositories designated by it, towards the appropriate health and welfare fund, a sum equivalent to the percentage set forth in the applicable plant supplemental agreement of its total gross weekly payroll (before deduction for federal or state taxes) due all employees (whether Union or non-Union employees) in the aforementioned bargaining unit (except such trial period employees who are then ineligible for benefits from such fund because they had not been previously employed in other bargaining units on whose behalf contributions had been made to such fund, the payment for whom shall be made retroactively to the inception of their employment by the Employer when they have passed their trial period). Such health and welfare fund shall be a trust fund established by collective agreement and maintained in trust for the purpose of providing employees with health, welfare and recreation benefits and services.

(b) The Employer shall at the same time and place make the payments set forth in the applicable plant supplemental agreements towards the ILGWU National Retirement Fund, and, towards the ILGWU Health Services Plan.

(c) If the Employer employs contractors of whatever kind to perform any apparel work (other than the application of trim or embroidery) for it, it shall, in ad-

dition, pay at the same time and place and for the same period to the Union, or to affiliates or depositories designated by the Union, towards said funds, a percentage of the total amount paid to or due to such contractors each week for such work, or, at the Union's option, a percentage of total gross wages as hereinabove set forth of the employees employed by such contractors. The Union shall be free to exercise its option as set forth above at any time and any number of times in its sole discretion: The percentage of the total gross payroll shall be that set forth in the plant supplemental agreement of the Employer-owned plant which normally produces the same or similar work. If no such Employer-owned plant exists then the percentage of total gross payroll shall be that which prevails in the Union agreement in the major market where the same or similar work is produced. The percentage of the contractor's statement shall be arrived at by multiplying the applicable percentage contributions to such funds based on total gross payroll by .75. The foregoing payments shall be made toward the following funds in the proportions specified herein:

(i) the appropriate health and welfare fund;

(ii) the ILGWU National Retirement Fund; and

(iii) the ILGWU Health Services Plan.

The Employer shall not be obligated to make any payments which have been previously made in full by a contractor.

(d) The payments made hereunder by the Employer shall not constitute or be deemed wages due to the employees.

(e) The said funds shall be maintained and administered in accordance with the by-laws or rules and regulations adopted for that purpose. The Employer shall not have any legal or equitable right, title, claim or interest in or to said funds with respect to contributions made hereunder. No individual employee shall have any legal or equitable right, title or interest in or claim against (i) his or any other employer's payments toward the said funds, or (ii) said funds, except as may be provided by the by-laws or rules and regulations of said funds.

2. The ILGWU National Retirement Fund and the ILGWU Health Services Plan shall each be administered by Boards of Trustees, the members of which shall be the trustees of said Funds. Said Boards of Trustees shall be composed of union representatives and an equal number of representatives of Employer-contributors to said Funds. If any Board of Trustees shall be deadlocked on any issue or matter arising in connection with the Fund which it administers, the same shall be decided by a neutral person as set forth in the by-laws or rules and regulations of said Fund, and his decision shall be final and binding. The parties hereby ratify, confirm and approve the composition and membership of the Boards of Trustees as now or hereafter constituted.

Each Board of Trustees shall adopt and promulgate such by-laws or rules and regulations to effectuate the purposes of the particular Fund which it administers as it may deem necessary and desirable, including the detailed basis upon which payments from the Fund will be made, and shall have the power to modify the same from time to time. The parties hereto agree to be bound thereby and they are hereby incorporated in and made part of this agreement.

An annual audit of the ILGWU National Retirement Fund and the ILGWU Health Services Plan shall be made by accountants designated by the body administering each Fund. A statement of the results of such audit shall be made available for inspection by interested persons at the principal office of the Funds and at such other places as may be designated by the body administering the particular Fund.

The monies paid towards the ILGWU National Retirement and the ILGWU Health Services Plan Fund; shall not be used for any purpose other than to provide for pensions or annuities on retirement or death of employees, to employees and their beneficiaries and health services respectively and to pay the operating and administration expenses thereof. The monies of the said Funds shall be kept separate and apart from all other monies.

3. The Board of Trustees or other body administering any of the aforementioned funds is hereby authorized and empowered, in its sole discretion and upon such basis as it deems desirable, to transfer or mingle the assets of the said health and welfare fund or to merge said fund with any other health and welfare fund, or funds, said retirement fund with any other retirement fund or funds or said ILGWU Health Service Plan with any other health services as the case may be, now existing or hereafter established, and provided for in a collective bargaining agreement with the International Ladies' Garment Workers' or an affiliate thereof. In the event of such mingling, transfer, or merger, the amounts hereinabove provided to be allocated towards the respective funds shall thereafter be paid over to the fund or funds with which there has been such mingling, transfer or merger.

4. The Union, the Board of Trustees of any of the aforementioned funds, or either of them, shall be proper parties in interest to enforce collection of payments due from the Employer toward any Fund.

ARTICLE XXX: CONTRACTORS—ADDITIONAL SHOPS—MOVING—INTEGRATED PRODUCTION—IMPORTS

1. Except with respect to imports under this Article hereunder, the Employer shall have no apparel work (which shall not include the application of trim or embroidery) performed outside of its own plants unless the workers of its inside plants are fully supplied with work, and unless such outside plant is under contract with a unit of the International Ladies' Garment Workers' Union or an affiliate thereof and is registered by the employer with the Union herein.

2. With respect to work (other than the application of trim or embroidery) done in contractors' plants for the Employer, the Employer shall be responsible to the employees employed in the contracting plants for (i) unpaid wages for two (2) payroll periods, (ii) holiday and vacation pay in the proportion that the Employer's work bears to the total work produced by the contractor in the holiday week or vacation year and (iii) to the appropriate unit of the International Ladies' Garment Workers' Union for dues and other monies due.

3. Should the Employer desire to expand or open an additional plant, notice thereof shall be given by said Employer to the Union prior to hiring any employees arising from the expansion or opening of such plant and such plant shall be operated under all the terms and con-

ditions of this agreement. In no case, however, shall the expansion or opening of such plant result in reducing the work or the number of employees at present employed in the plants to which this agreement is now applicable, except as the parties may otherwise agree.

4. The Employer agrees that during the term of this agreement it shall not move its plants from their present location if such removal requires any substantial increase in the distance to be travelled by its employees to the moved plant without prior negotiation and agreement on the removal between the parties hereto.

5. In order to safeguard working standards and employment opportunities of the employees covered by this and other agreements in the garment industry, it is agreed that all garments or parts thereof (not including the application of trim or embroidery) manufactured and/or distributed by the Employer during the term of this agreement, whether finished or partly finished, shall be manufactured exclusively either in its own plants or, as parts of an integrated process of production under the jobber-contractor system of production, in a plant under contract with a unit of the International Ladies' Garment Workers' Union and accordingly the Employer shall not handle, purchase, or otherwise obtain, directly or indirectly, any other wholly or partly finished garments whatsoever (not including the application of trim or embroidery) during the term of this agreement.

6. The parties agree that an Employer and its affiliates and subsidiaries (hereafter collectively referred to as "Employer"), engaged in the United States in the production of wholly or partly finished garments or parts thereof, and also engaged in importing a substantial

amount of wholly or partly finished garments or parts thereof including garments assembled under Item 807 of the Tariff Code (hereafter referred to as "imported garments"), violate this agreement and damage the Union and the interests of the workers protected by the Union by impairing and depreciating the labor standards, employment opportunities and stability of employment provided by this agreement, its predecessors and other collective agreements with the Union. The parties also agree that the specific amount of such damages is difficult if not impossible to ascertain. Accordingly, it is agreed that upon such a violation, the Employer shall pay to the Union liquidated damages equal to one and one-half (1-1/2%) percent of the first cost of a substantial amount of imported garments.

7. For the purpose of this agreement (i) the first cost of imported garments means the price at which they are sold or offered for sale in the exporting country in the ordinary course of the export trade to United States plus the cost of packaging for shipment to the United States plus the price of delivery to the side of the overseas vessel, except for Item 807 garments in which case first cost is defined as the added value labor cost and (ii) a substantial amount of imported garments means imported garments which, exceed fifteen (15%) percent of the dollar amount of the employers total annual volume of sales, calculated on a fiscal year basis, beginning with the fiscal year ending in 1980.

8. The provisions contained in the immediately preceding paragraphs shall not apply to the imports of piece goods, laces, buttons and the like, and to garments and accessories if, at the time an Employer desires to purchase or manufacture or otherwise obtain such garments or ac-

cessories, they could not be manufactured in shops with contractual relations with International or any affiliate thereof.

ARTICLE XXXI: SUBSIDIARY, AUXILIARY OR AFFILIATED FIRMS

1. Subsidiary, auxiliary or affiliated apparel firms or corporations shall, for the purpose of this agreement, be deemed bound by all the terms of this agreement. The arbitrator selected as provided in ARTICLE XXXVII shall have the right and power to determine whether an alleged subsidiary, auxiliary, or affiliate of the Employer is such subsidiary, auxiliary or affiliate, and shall be guided by the proof of facts tending to establish any connection or interest, direct or indirect, between them or tending to establish a plan, scheme or device on the part of the Employer to avoid or evade the provisions of this agreement by or through such subsidiary, auxiliary or affiliate.

2. The Employer shall not enter into any partnership or consolidate or merge with another person, firm or corporation in the industry, unless the new firm assumes all accrued obligation to the workers covered by this agreement, the Union and the Funds toward which payments are required under ARTICLE XXVIII.

ARTICLE XXXII: NEW PRODUCTS

If the Employer at any time makes garments in any branch of the garment industry other than or in addition to the branch in which the Employer is presently engaged, the Union at its option may forthwith renegotiate the terms of this agreement with respect to such garments. In the event of any disagreement concerning the new terms, the

no-strike, no-stoppage obligations under ARTICLE XXXVII shall be suspended and of no force and effect.

ARTICLE XXXIII: NON-PAYMENTS

1. Notwithstanding ARTICLES XXXVI AND XXXVII or any other provision of this agreement, if the Employer fails for five (5) days to pay in full any wages due to the workers covered by this agreement, any dues or other monies due to the Union, any payments due under ARTICLE XXX, or any payments due towards the Fund as provided in ARTICLE XXIX, the Union may immediately direct the workers to discontinue work until all sums due have been paid in full. This right shall be in addition to all other remedies available to the Union.

2. In the event of any breach of this agreement by the Employer (including any non-payment by the Employer of sums due to any employees for wages, holiday pay, or otherwise), the Union in its own name shall be a proper party in interest to enforce compliance by the Employer with this agreement on the Union's own behalf and on behalf of any affected employees without further assignments or authorizations from them.

ARTICLE XXXIV: LIQUIDATED DAMAGES FOR VIOLATIONS

1. Should the Employer have any work performed in a non-ILGWU plant in violation of ARTICLE XXX, the parties agree that such violation would result in damaging the interest of the employees represented by the Union and of the Union itself in the establishment and maintenance of the labor standards provided in this agreement. The parties also agree the specific amount of damage to

the Union upon such violation is difficult, if not impossible, to ascertain. Therefore it is agreed that upon such violation the Employer shall pay twenty (20%) percent of the contractor's statement without any offsetting credits.

2. Should the parties agree upon liquidated damages for any other breach of this agreement, the same shall be paid to the Union in full discharge for the Employer's liability for said breach. If the parties are unable to agree upon the amount of liquidated damages for a breach of this agreement the matter shall be treated as a dispute subject to arbitration. Nothing in the aforesaid shall be deemed to limit or add to such powers as the arbitrator may now have. The foregoing liquidated damages shall be in addition to all other remedies available to the Union and the employees.

3. Nothing in the aforesaid shall be deemed to limit or add to such powers as the arbitrator may now have.

ARTICLE XXXV: AGENCY

The Employer agrees that the sole persons authorized or having the power to act as agents of the Union, or to bind the Union legally with respect to matters arising out of this agreement or arising out of the relations between the Employer and the Union, or to subject the Union to any liability whatever by reason of any act or omission are the Manager of the local union and the designated Business Agent servicing the shop (or such substitute or additional persons as the Union may hereafter formally designate by written notice to the Employer). The Union shall not be responsible for the acts or omissions of any other person, including members and employees of the Union.

ARTICLE XXXVI: NO STRIKE, NO LOCKOUT PLEDGE

The Union agrees that it will not call, authorize or ratify a strike or stoppage during the life of this agreement, except for the Employer's failure to submit to arbitration or to comply with the decision of an arbitrator. Should any strike or stoppage occur, the Union's sole obligation shall be to endeavor in good faith, within twenty-four (24) hours after receipt of written notice thereof from the Employer, to bring about the return to their work of its members who have stopped work. Upon the failure of any employees to return to work within said twenty-four (24) hour period, the Employer may at its option consider that such employees have abandoned their employment, but should the Employer reemploy such employees, it shall treat all such employees alike and shall not discriminate against or among them. Compliance by the Union in good faith with this provision shall be deemed full compliance with the Union's obligation hereunder.

The foregoing no-strike, no-stoppage obligations shall be wholly suspended and of no force and effect, and the Union may call, authorize or ratify a strike or stoppage, during the continuance of any strike or stoppage (not in violation of contract) declared by the International Ladies' Garment Workers' Union or any unit thereof at any plant of any firm which is directly or indirectly affiliated with or related to the Employer herein.

The Employer agrees that it will not order, authorize or ratify a lockout during the life of this agreement. Should any lockout occur, the Employer's sole obligation shall be to endeavor in good faith, within twenty-four (24) hours after receipt of written notice thereof from

the Union, to terminate the lockout and to reemploy the employees. Upon failure of the Employer to do so within said twenty-four (24) hour period, the Union at its option may treat the matter as a dispute under ARTICLE XXXVII, or may consider that the Employer has forfeited its rights under the agreement.

ARTICLE XXXVII: ADJUSTMENT MACHINERY —COURT ACTIONS BARRED

1. Any and all disputes, complaints, controversies, claims or grievances whatsoever between the Union or any employees and the Employer or any person responsible under ARTICLE XXXIV which directly or indirectly arise under, out of, or in connection with or in any manner relate to this agreement or the breach thereof, or the acts, conducts or relations between the parties shall be adjusted as follows:

(a) The Shop Chairperson or in the case of piece rate disputes the Shop Committee, together with a representative of the Union, shall attempt to settle the matter with a representative of the employer. No adjustment shall be deemed binding on the Union unless approved by an authorized representative thereof.

(b) If they shall fail satisfactorily to dispose of any such dispute, complaint, controversy, claim or grievance, or if for any reason it has not been taken up by them, or if the matter does not lend itself to the foregoing procedure, the matter shall be submitted to arbitration before Mr. Eric Schmertz as arbitrator. If the Arbitrator shall, in his sole discretion, decide not to hear personally a particular case, he shall designate a substitute arbitrator to hear the case. The substitute arbitrator shall have the

same rights and powers as the arbitrator with regard to the particular case for which he has been designated. Should the arbitrator resign, refuse to act or be incapable of acting or should the office become vacant for any other reason, the parties shall within five (5) days from the occurrence of any of these events agree upon and designate another person to act as arbitrator. Upon failure by the parties to agree, the arbitrator shall be selected through the machinery of the Federal Mediation and Conciliation Service in accordance with its rules.

(c) The award or decision of the arbitrator, in addition to granting such other relief as the arbitrator may deem proper may contain provisions commanding or restraining acts and conduct of the parties. If either party shall default in appearing before the arbitrator, he is empowered nevertheless to take the proof of the party appearing and render an award thereon. Any award or decision of the arbitrator shall be final and binding and shall be enforceable by appropriate proceedings at law or in equity. The taking of the oath by the arbitrator is hereby expressly waived. His fee shall be borne equally by the parties hereto.

(d) Any papers, notices or processes to initiate or continue an arbitration hereunder, and all papers, notices or processes in any application to a court to confirm or enforce an arbitration award hereunder, including service of the papers conferring jurisdiction of the parties upon the court, may be served by registered mail directed to the last known address of the Employer or the Union.

2. The procedure herein established for the adjustment of disputes shall be the exclusive means for the determination of all disputes, complaints, controversies,

claims or grievances whatsoever, including the arbitrability of any dispute, and including claims based upon any breach of the no-strike, no-stoppage pledges of this agreement or upon any other breach of this agreement. It is intended that this provision shall be interpreted as broadly and inclusively as possible. Neither party shall institute any action or proceeding in a court of law or equity, state or Federal, or before an administrative tribunal, other than to compel arbitration, as provided in this agreement, or with respect to the award of an arbitrator. This provision shall be a complete defense to and also grounds for a stay of any action or proceeding instituted contrary to this agreement.

3. Any dispute, complaint, controversy, claim or grievance which any employee may have against the Employer may be instituted and processed only by the Union in the manner herein provided. No employee shall have the right individually to institute or process any action or proceeding with reference to any dispute, complaint, controversy, claim or grievance, or to initiate or compel arbitration in the event the Union fails or refuses to proceed with arbitration.

ARTICLE XXXVIII: ADDITIONAL PROVISIONS

The provisions contained in the plant supplemental agreements shall constitute part of this agreement and be subject to all of its terms. Where a plant supplemental agreement provides terms which differ from those of this Master Agreement the provisions of the plant supplemental agreement shall govern.

No agreement or understanding which changes, varies or modifies any provision of this Master Agreement or of

any plant supplemental agreement shall be binding upon the Union unless it is duly executed by or received prior approval from the President of the International Ladies' Garment Workers' Union or the Union's National Administrator of this agreement.

ARTICLE XXIX: CONFORMITY TO LAW— SAVING CLAUSE

1. If any provision or the enforcement or performance of any provision of this agreement or any supplemental agreement is or shall at any time be contrary to law, then such provision shall not be applicable or enforced or performed, except to the extent permitted by law. If at any time thereafter such provision or its enforcement or performance shall no longer conflict with the law, then it shall be deemed restored in full force and effect as if it had never been in conflict with the law.

2. If any provision of this agreement or any supplemental agreement or the application of such provision to any personal circumstance shall be held invalid, the remainder thereof or the application of such provision to other persons or circumstances, shall not be effected thereby.

ARTICLE XL: TERM

This agreement shall go into effect as of February 1, 1980 and shall continue in effect until January 31, 1983.

IN WITNESS WHEREOF, the parties have caused this agreement to be signed the day and year first above written.

THE BARBIZON CORPORATION

By /s/ Anthony B. Ritter, President
(Name and Title)

INTERNATIONAL LADIES' GARMENT WORKERS' UNION

By /s/ Wilbur Daniels, Exec. V.P.
(Name and Title)

APPENDIX W

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration

-between-

ILGWU

-and-

THE BARBIZON CORPORATION

---

140 West 51st Street
New York, New York

June 19, 1984
10:20 a.m.

BEFORE:

HON. ERIC J. SCHMERTZ,

Arbitrator

* * *

WILBUR DANIELS, having been first duly sworn by the Arbitrator, was examined and testified as follows:

THE ARBITRATOR: Please give your full name to the reporter.

THE WITNESS: Wilbur Daniels.

MR. WIMBERLY: Off the record.

(Discussion off the record)

EXAMINATION BY MR. GOOD:

Q. Mr. Daniels, you are associated with the [697] International Ladies' Garment Workers' Union? A. Yes, sir.

Q. In what capacity? A. I am director of the master agreements department and executive vice president.

Q. For how long have you been associated with the union? A. I was employed by the union on February 8, 1943, continued in employment through the beginning of the summer of 1961, left then, returned in October '65, and have been in its employ since then.

Q. In what capacities have you been employed by the union? A. I have been employed as research associate, associate director of research, associate general counsel, assistant to the president, director of the master agreements department, vice president and executive vice president.

Q. In your capacities in the research department and in the legal department, would you have occasion to be involved in the negotiation and administration of contracts? A. Yes, sir.

Q. Would you have had any reason to become [698] familiar with the standard provisions in the ILGWU agreements? A. Yes, sir.

Q. What are your responsibilities as head of the master agreements department? A. My basic responsibility is to negotiate the master agreements and the supplementary agreements for large firms in our industry which have several plants in more than one administrative division of the ILG.

Q. Do you have anything to do with administering those contracts once they are negotiated? A. I have overall supervision of the administration, yes, sir.

Q. Were you involved as head of the master agreements department in the negotiations with Barbizon for the 1980 agreement? A. Yes, sir.

MR. GOOD: I believe, is it not, that is our Joint Exhibit 1?

It is our Joint Exhibit 1.

Q. Do you recall who represented the company during those negotiations? A. I dealt with a number of representatives. My initial call was with—to Bob Batterman of the [699] Proskauer firm, who previously represented the company. Thereafter I dealt with Melvin Kleeblatt and his then partner, Jack Glauberman. Thereafter I dealt with Jack Glauberman himself. Then he was succeeded by James Goodfriend and he was succeeded by Richard Wilsker, with whom I concluded the negotiations for the 1980 agreement.

Q. Were any of or all of these people attorneys? A. Each of them was—is an attorney.

Q. During the course of the negotiations for the 1980 agreement, did you deal with any person or persons by the name of Sugarman? A. I dealt with a Mr. Sugarman and his son, but that was in connection, largely, with the negotiations not of the master agreement with Barbizon but of a special local agreement for a plant it had purchased and was using in Puerto Rico.

Q. You testified that you reached final agreement on the 1980 agreement with Mr. Wilsker. Do you remember when that agreement was reached? A. In the spring of 1982.

Q. Was it retroactive? A. It was retroactive to February 1980, when the preceding 1977 agreement expired.

[700] Q. We are talking in general terms about the agreement. What did the agreement consist of? A. The agreement consisted of two parts, the so-called master agreement which was with Barbizon and applied to any and all plants it might then own or would own in the future other than the Puerto Rican plant, and applied by its terms to the plant it then had operating in Montville, New Jersey.

There was, in addition to that, a supplemental agreement for Montville.

The master agreement had previously applied to production companies that Barbizon had owned at one time in Pennsylvania, New Jersey, and in Utah. By the time I completed the negotiations with Mr. Wilsker, none of those plants was any longer in existence.

* * *

[735] AFTERNOON SESSION

June 19, 1984

2:35 p.m.

WILBUR DANIELS, having been previously duly sworn, resumed and testified further as follows:

EXAMINATION BY MR. WIMBERLY:

Q. Mr. Daniels, I would like to get a couple of dates straightened out here.

I believe you testified that the last contract was signed in the fall of 1982. A. No, I didn't.

Q. Maybe I misunderstood you. A. I said my recollection was that it was done in the spring of '82.

Q. Wasn't it June of 1981? A. I was involved with so many representatives of the company, I have no—I recall it was in the spring. Whether it was '81 or '82, I don't recall. I think it was, but I am not sure.

Q. Let me try to refresh your recollection here, or whatever.

The prior contract before the last contract [736] expired on January 31, 1980; is that correct? A. Yes, sir.

Q. So if the subsequent contract was not signed until spring of '82, that would have been over—almost two and a half years?

MR. GOOD: Mr. Daniels testified to the fact that it was retroactive to February 1980, when the previous contract had expired.

MR. WIMBERLY: I recall that. I am only trying to establish when the last contract was signed. There are documents in the record. Although the contract itself is not signed or doesn't bear a date on it, there are so-called side letters in the record, Joint Exhibit 3, that bear a date of June 19, 1981.

I am just trying to establish if that's the approximate date on which the last contract was signed, rather than 1982.

* * *

APPENDIX X

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 22

CASE NO. 22-RC-9003

THE BARBIZON CORPORATION,
Employer

-and-

LOCAL 711, INTERNATIONAL FEDERATION
OF LABOR UNIONS,
Petitioner

BRIEF OF INTERVENOR, LOCAL 161, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

REITMAN, PARSONNET, MAISEL & DUGGAN
744 Broad Street
Newark, N.J., 07102
201-642-0885
Attorneys for Intervenor,
Local 161
JESSE H. STRAUSS, ESQ.

Dated: June 17, 1983

Of Counsel:
MAX ZIMNY, ESQ.
General Counsel, ILGWU
1710 Broadway
New York, N. Y., 10019

PARTIES AND NATURE OF PROCEEDINGS

The Employer is The Barbizon Corporation. (T-6). On May 16, 1983, Local 711, International Federation of Labor Unions filed a petition for election bearing Docket Number 22-RC-9003. Local 161, International Ladies' Garment Workers' Union, AFL-CIO (ILGWU), intervened on the basis of a pre-existing collective bargaining agreement. The parties agreed that the appropriate unit includes all non-supervisory production, floor, packing and shipping workers employed by the Employer at its 8 Stiles Lane, Pine Brook location, and excludes all maintenance employees, office clerical employees, guards, supervisors and professional employees as defined in the Act. (T-13 incorrectly designates "tool work" rather than "floor" employees.)

BACKGROUND

The ILGWU and Barbizon have had contractual relationships for over 40 years (T-15). Barbizon is in the lingerie and nightwear garment business. In the 1950's Barbizon had three of its own production plants in Pennsylvania, New Jersey and Utah known as inside shops. (T-16). The three plants were covered by a Master Agreement which sets forth recognition and other general terms describing the collective bargaining relationship. In addition, separate supplemental agreements were executed for each of the plants where the actual sewing of garments was performed. The New Jersey production plant and its supplemental agreement also covered distribution and shipping center located at the New Jersey production facility. (T-16-17).

All three of the inside production plans previously covered by the Master Agreement and the supplements

have closed down. All that remains is a distribution center which moved from Paterson, New Jersey, to Montville, New Jersey, when the Paterson production facility ceased operation. (T-17). The unit in question herein is limited solely to the Montville distribution center and does not involve any employees engaged in the production of garments. (T-17). With the curtailment of production by its inside shops, Barbizon has chosen to have its products produced by contracting plants in the United States owned by other employers and other products are imported from abroad. (T-17). The means in which a party manufactures ladies' apparel by employing independent contractors is commonly known in the garment industry as "jobber contracting."

Despite the demise of Barbizon's three inside production shops, the Master Agreement has survived because of provisions therein which are unique to the garment industry and which are specifically authorized by the National Labor Relations Act, as amended. The Master Agreement (I-1) provides that no production work shall be performed by or contracted to an outside plant unless that outside plant is under contract to the ILGWU. Article XXX specifically covers the integrated process of production under the jobber-contractor system of production. The Master Agreement also provides for liquidated damages in the event that production work is contracted out but not in conformance with the terms of the contract. (Article XXXIV).

The aforesaid provisions constitute what is known as a jobber's agreement or a *Hazentown* agreement after the decision of *Danielson v. Joint Board, ILGWU (Hazentown, Inc.)*, 494 F. 2d 1230 (CA2, 1974) 85 LRRM 2902, which recognized the garment proviso of Section 8(e) of the

Act and the exemption of the garment industry from certain application of the secondary boycott provisions of the Act. The Union can induce a jobber to agree to contract only to union contractors even in instances where the union does not seek to represent the employees of the employer. The significance of these provisions in the context of this case lies in the fact that they apply solely to the manner in which Barbizon fulfills its production needs. These provisions have no impact on the distribution facility employees who neither are engaged in the production of garments on behalf of Barbizon nor are affected by the manner in which Barbizon chooses to have its garments produced. (T-19-20). Simply stated, the contracting-out and production clauses of the Master Agreement are not terms and conditions of employment that affect the employees of the Montville facility. (T-20).

* * *

CONCLUSION

For the reasons set forth hereinabove, the instant petition should be dismissed on the basis of a contract bar.

Respectfully submitted,

Reitman, Parsonnet, Maisel & Duggan
744 Broad Street
Newark, N. J., 07102
201-642-0885

By /s/ Jesse H. Strauss
Jesse H. Strauss

Dated: June 17, 1983

Of Counsel:
Max Zimny, Esq.
General Counsel, ILGWU
1710 Broadway
New York, N. Y., 10019

APPENDIX Y

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
Twenty-second Region

Case No. 22-RC-9003

In the matter of

BARBIZON CORPORATION,
Employer,

-and-

LOCAL 711, INTERNATIONAL FEDERATION
OF LABOR UNIONS,
Petitioner.

---

970 Broad Street,
Newark, New Jersey
Tuesday, June 7, 1983

The above-entitled matter came on for hearing pursuant to notice, at 2:00 p.m.

BEFORE:

RAY HEINEMAN, Hearing Officer.

APPEARANCES:

JAMES W. WIMBERLY, JR., ESQ. Mitchell, Clarke, Pate, Anderson and Wimberly, Georgia Federal Savings Building, Atlanta, Georgia; appearing on behalf of the Employer.

PAUL A. FRIEDMAN, ESQ. Schneider, Cohen and Solomon, 591 Summit Avenue, Jersey City, NJ; appearing on behalf of the Petitioner.

JESSE H. STRAUSS, ESQ. Reitman, Parsonnet, Maisel and Duggan, 744 Broad St., Newark, NJ; appearing on behalf of the Intervenor

* * *

[14] HEARING OFFICER: It appears that the sole issue of concern in this hearing is the status of a contract which the Intervenor asserts is a bar to the petition in this proceeding.

Mr. Strauss, would you care to present your first witness?

MR. STRAUSS: Wilbur Daniels.

Whereupon,

WILBUR DANIELS,

called as a witness by and on behalf of the Intervenor, having been first duly sworn, was examined and testified as follows:

HEARING OFFICER: Would you state your name for the record, please.

THE WITNESS: WILBUR DANIELS.

HEARING OFFICER: Mr. Strauss, your witness.

DIRECT EXAMINATION

Q. (BY MR. STRAUSS) Mr. Daniels, by who are you employed? A. I'm employed by the International Ladies Garment Workers Union.

Q. And what title do you hold with the ILGWU? A. I'm executive vice-president and I'm also director of the master agreements department.

[15] Q. How long have you held the position of executive vice-president? A. Since March of 1973.

Q. And how long have you been director of the master agreements section? A. Since October, 1965.

Q. As part of your duties, what, if any role, have you played with regard the relationship between ILGWU and the Barbizon Corporation? A. I have been charged with the duty of negotiating the master and supplemental agreements between the Barbizon Corporation, the ILGWU and its local affiliates.

Q. How long have you had that responsibility? A. Since October, 1965.

Q. Can you please briefly describe the history of your relationship between the ILGWU and the Barbizon Corporation? A. The collective bargaining relationship between the International Ladies Garment Workers Union and the Barbizon Corporation is one of the longest in the history of the Union. Indeed, when I became employed by the ILGWU in 1943, it is my recollection that there were agreements with plants of the Barbizon Corporation then in effect and that there have been agreements in effect even prior to my employment in 1943.

[16] The relationship between the Barbizon Corporation and the ILGWU and its affiliates has been a friendly and a successful one.

When I took over the responsibility in October of 1965, the Barbizon Corporation then had three production plants in the jargon of the trade, three inside plants.

Q. What did they produce? A. They produced various types of lingerie and some times nightwear.

The plants were located then and subsequently in Pennsylvania, in New Jersey and then later in Utah.

Q. Were each of these plants covered by collective bargaining agreements with the ILGWU? A. Yes, sir.

They were covered by when I took on the responsibility, by a master agreement which set forth recognition and other general terms describing the collective bargaining relationship.

Attached to that master agreement were separate supplemental agreements which set forth the specific terms applicable to each of the production, that is to say, each of the inside plants in which the actual sewing of the garments was done.

In addition to that there was a shipping and distributions center in New Jersey, which was also covered [17] by the supplemental agreement for the New Jersey plant.

Q. At the present time, is the Utah facility still in existence? A. No, sir.

Q. How about the Pennsylvania facility? A. It is no longer in existence.

Q. How about the Patterson production facility? A. The Patterson production facility is not in existence. The distribution center continued in existence after the plant was terminated. That Patterson distribution center was subsequently moved to its present location in Montville.

Q. Is there any sewing production work that takes place in Montville? A. I do not know of any.

Q. Do you know by what method the company currently has garments produced? A. To the best of my knowledge, the company has its garments produced in the following way, ways. It has some of its products produced in contracting plants located in the mainland of the United States. It has some of its products in a plant which it owns, located in Puerto Rico. It has other products produced abroad and then imported into the United States.

Q. You mentioned a plant in Puerto Rico, is that [18] covered by the master agreement or any supplemental agreement— A. No, sir.

Q. —that you have previously mentioned? A. No, sir.

Q. With regard to plants in which work for the Barbizon company is contracted out to, do you know whether these are subsidiaries or affiliates of Barbizon Corporation? A. I have no knowledge of the ownership relationship one way or the other.

Q. Is there any provision in the master agreement with regard to the obligations of the Barbizon Corporation with regard to corporations with which it contracts out work? A. Yes, sir.

Q. What is that obligation? A. The obligations set forth in the master agreement, with respect to contracting out, are those, are very similar to those which prevail in the unionized section of the womens and misses garment industry. And indeed, that is one of the major functions of the master agreement.

The master agreement was devised by the ILGWU, to cover an employer which has its own facilities located in different administrative divisions of the ILGWU.

The Barbizon Corporation was given a master agreement because at one time it had three separate plants, as I [19] noted, one in Pennsylvania, which was covered by the northeast department of the ILGWU, one in Utah, which was covered by the western states division of the ILGWU and one in New Jersey, which was covered by the eastern region, later called the New Jersey region of the ILGWU.

The master agreement contains provisions that deal with recognition, that deal with those terms which are of uniform and common application to all of the plants and to the corporate owner, as such. It's the basic provisions that are uniform in the master agreements. There are variations from agreement to agreement, but uniform in basic subject matter and deal with the obligations of the owner without regard to the individual terms of employment in the separate plants and without regard to the individual and differing terms which may apply in the separate supplemental agreements.

The master agreement covers, for example, the owner's obligation to deal with contracting firms which are in turn covered by Union provisions. It deals with such, in a sense, universally applicable.

Q. Is that with regard to production work? A. That is with regard to production work, yes sir.

Q. Would that condition that appears in the master agreement, apply to the shipping facility in Montville? A. It does not apply to the shipping facility because [20] it deals with the production of garments and the Montville facility deals with the distribution rather than the sewing, that is to say, production of garments.

Q. Would you consider that a term and condition of employment that affects the employees of the Montville facility? A. No sir, because it does not apply to distribution, but applies to production.

Q. That part of the master agreement that refers to obligations on the part of the employer with regard to shops to which it contracts out production work, is there a general term that's used in the industry that refers to that relationship or that obligation? A. It's called variously, contracting out. It's sometimes referred to as the Hazentown provisions of the agreement. It's sometimes referred to as union production provision.

Q. But that was with regard to production work, is that correct? A. Yes, sir.

* * *

APPENDIX Z

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85-Civ-8822 (EW)

THE BARBIZON CORPORATION,
Plaintiff,

v.

ILGWU NATIONAL RETIREMENT FUND, SOL C. CHAIKIN AND JOSEPH MOORE,
Defendants.

EXHIBITS TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

No.	Exhibit
35.	Arbitration Award of Eric J. Schmertz, Arbitrator in the matter of the arbitration between ILGWU and Barbizon; Exhibit B to the Complaint filed in Civil Action No. 85-Civ-8979, Southern District of New York, USDC.

A1:36

A214

In the Matter of the Arbitration

between

International Ladies' Garment
Workers' Union

and

Barbizon Corporation

OPINION AND AWARD

This arbitration proceeding was held pursuant to the provisions of a collective bargaining agreement (the contract) covering the period from February 1, 1981, to January 31, 1983, between the International Ladies' Garment Workers' Union (Union) and Barbizon Corporation (Barbizon). The Undersigned was selected as the Arbitrator. Hearings were held on November 14, 1982, December 22, 1983, and April 3, 5, 9 and June 19 and 28, 1984. Both parties presented oral testimony, documents and legal memoranda and each party submitted a post-hearing original brief, an answering brief and a reply brief. The Arbitrator's Oath was waived.

The Union initiated the grievances which are the subject of this proceeding by a letter of complaint, dated July 21, 1983, which was amended by a letter of complaint, dated August 24, 1983. These written complaints alleged Barbizon had violated the contract by: (1) failing to pay required benefit fund contributions; (2) operating a non-union shop in Puerto Rico; (3) using non-union outside contractors; and (4) refusing to furnish certain books and records to the union auditors to enable the union to determine whether Barbizon had used additional non-union outside contractors.

At the first hearing, the Union purported to amend its complaint by claiming the contract was extended by operation of law beyond January 31, 1983, and demanded access to Barbizon's books and records for the extended period. The Union withdrew this last claim in its original brief. Furthermore, the parties have reported that the first claim (benefit fund contributions) has been settled and it has been withdrawn.

The Union has demanded liquidated damages in the amount of $211,292.28 for Barbizon's use of non-union outside contractors. The amount demanded is not in dispute as constituting a correct calculation if Article XXIV of the contract is applicable and enforceable. It also demands damages for Barbizon's operation of the non-union shop in Puerto Rico. Further, the Union demands access to the books and records denied it by Barbizon and damages, if any, based on what an audit would reveal concerning Barbizon's use of non-union outside contractors.

THE ISSUES

(1) Did Barbizon violate Article XXX of the contract by employing non-union outside contractors during the term of the agreement under conditions which did not meet the requirements of Article XXX?

(2) If Barbizon did violate Article XXX, would payment of liquidated damages to the Union in accordance with paragraph 1 of Article XXIV of the contract violate the provisions of LMRA Section 302?

If such payment does not violate Section 302, is the liquidated damage clause (par. I, Art. XXX) enforceable

as a matter of contract law? If not, what is the measure of damages?

(4) Did Barbizon's operation of a non-union plant in Albonito, Puerto Rico, violate the contract or the supplemental letter agreement, dated June 19, 1981, or both?

(5) If the operation of the non-union plant in Puerto Rico violated an agreement between the parties, what is the proper measure of damages?

(6) Are any of the Union's claims time-barred in whole or in part?

(7) Did Barbizon violate the contract when it refused to give the Union access to certain books and records?

(8) Is the Union entitled to interest on a damage award?

BARBIZON'S USE OF NON-UNION OUTSIDE CONTRACTORS

It is undisputed that Barbizon used non-union outside contractors from February 1, 1981, for a period during the 1980-83 contract.* The Union claims that this use of non-union outside contractors by Barbizon violated paragraph 5 of Article XXX of the contract (hereafter "outside contractor" clause). . . .

* * *

*Apparently its use of non-union outside contractors for the earlier part of the contract term was the subject of a $10,000 payment to the Union by Barbizon (Daniels, T.733). However, the Union had not filed a grievance with respect to Barbizon's use of non-union outside contractors prior to the one which initiated this proceeding. (Fischer, T.92)

Resolution of this aspect of the dispute requires examination of some contested facts, characterization of the facts established by the evidence and determining the meaning of and applying paragraph 8 of Article XXX (hereafter referred to as the "exemption clause").

The use of outside contractors (union or non-union) was not a matter of serious concern for Barbizon until it determined to and did close down its own union shops. This was a process which began in the early 70's, but Barbizon's need for outside contractors did not become acute until it began to close its union plant in Provo, Utah, in 1979. The closing of this plant was completed in June, 1981. When it closed production in 1979, the Provo plant produced 92% of Barbizon's output. There was testimony from witnesses called by Barbizon that with Provo's closing, Barbizon was under time pressure to meet its need for outside contractors and by the early part of 1981 the need had become "critical". (T. 135-36, 130, 139). Barbizon had a need for facilities with adequate production capacity, an ability to meet production and delivery schedules and with machine operators able to handle the special fabrics and special manufacturing requirements and equipment used for Barbizon's production specifications.

* * *

THE USE OF NON-UNION OUTSIDE CONTRACTORS—DISCUSSION

It is undisputed that non-union contractors were used by Barbizon during the relevant period. To determine whether the contract was breached by Barbizon requires the application of the exemption provision to the facts of

record. The contract agreed to by the parties is the sole standard for determining this issue. . . .

* * *

THE USE OF THE ALBONITO, PUERTO RICO, PLANT

Contemporaneously with the parties agreement to the 1980-83 contract (the master agreement) they entered into a side agreement, dated June 19, 1981. There were extensive negotiations concerning this side agreement and negotiations concerning the Albonito plant followed as well. The evidence shows that the Employer's plant in Albonito, Puerto Rico, was not covered by the master agreement. It was covered by that side agreement which provided that conditions for any newly-opened inside shop "would be negotiated to conform with the area standards in the area of its location." The undisputed evidence also showed that the parties continued to negotiate the terms of an agreement for the Puerto Rican shop until long after the Master Agreement had expired and until the Employer had expressed a good-faith doubt about the Union's majority at the one remaining Union facility. Accordingly, I hold that the Employer met its obligations under the side agreement and the Union's request for damages premised on the Employer sending work to its non-union inside shop in Puerto Rico must be denied.

* * *

The Undersigned, duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above named parties, makes the following AWARD:

* * *

6. As damages, Barbizon shall pay to the Union the sum of $211,292.28;

7. The Union's demand for interest on $211,292.08 is denied.

/s/ Eric J. Schmertz
Eric J. Schmertz
Arbitrator

DATED: August 16, 1985
STATE OF New York) ss.:
COUNTY OF New York)

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.

/s/ Eric J. Schmertz

APPENDIX AA

ARNOLD & PORTER
1200 New Hampshire Avenue, N. W.
Washington, D. C. 20036
(202) 872-6700

June 11, 1981

Pension Benefit Guaranty Corporation
2020 K Street, N.W.
Washington, D.C.

Re: *ILGWU National Retirement Fund*

Dear Sir or Madam:

The ILGWU National Retirement Fund (the "Fund") intends to apply, pursuant to section 4203(f) of ERISA, for approval of amendments imposing special withdrawal liability rules similar to the rules prescribed for the construction and entertainment industries. The purpose of this letter is to provide the corporation with basic information about the Fund and briefly describe the reasons why special withdrawal liability rules are appropriate for the women's and children's apparel industry and will not pose a significant risk to plan participants or to the corporation.

In general, this is an industry that caters to the changing fashions in women's clothing. Many firms operate on a project-to-project basis, responding to the orders received for each new seasonal line of garments. As fashions shift, individual firms go out of business or become dormant, without impairing the contribution base of the fund or the vitality of the industry as a whole. The orders lost by an unsuccessful firm are picked up by a new or expanding

firm that may produce its garments with the same workers previously employed by a firm that failed. Under these circumstances, the failure of a particular firm is not an appropriate occasion for imposition of withdrawal liability and such liability is not necessary for the protection of the fund or its participants.

I. *General Description of Fund and Industry*

A. *The Fund*

As of January 1, 1981, almost 300,000 active workers were covered by the ILGWU National Retirement Fund. As of the same date, the Fund was paying benefits to approximately 105,000 retired or disabled workers. The Fund membership is geographically dispersed throughout the United States, although employment is concentrated in the states along the eastern seaboard. The maximum benefit provided by the plan is $120 per month for workers who are disabled or who retire at normal retirement age with 20 or more years of covered service.* Employee turnover is high, and about 41% of the workers in the industry as of January 1, 1979 had been employed in the industry for less than five years.

The Fund is economically healthy with current assets at January 1, 1981, valued at cost, in excess of $340 million. For purposes of computing withdrawal liability, unfunded vested liabilities as of January 1, 1980 were approximately $890 million. Contributions have grown from $57.2 million in 1975 to $136.6 million in 1980, an increase in just five years to 240% of the 1975 level. Wage increases ne-

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*A small percentage of covered workers can qualify for a wage-related benefit of up to $150 per month.

gotiated in the last collective bargaining contracts will automatically produce further increases in Fund assets and contributions over the next several years. Employer contributions to the Fund are expected to exceed $150 million in 1981.

B. *The Industry*

The Fund covers workers throughout the United States, including Puerto Rico, in all areas of the women's and children's garment industry. Since most contributing employers make only certain types of garments, a number of distinct sub-industries are covered by the plan, including sportswear, skirts, dresses, cloaks and suits, underwear and lingerie, blouses, girdles and brassieres, knitted outerwear, snow suits, children's outerwear, rainwear, knitted underwear, accessories, embroideries, and other products.

In 1980, the workers covered by the Fund were employed by a total of more than 8000 different firms, including manufacturers, jobbers and contractors. The majority of the firms are small and the industry is marked by frequent closings of existing firms and entry of new firms into the industry. A recent report by the New York State Department of Labor demonstrates the high degree of turnover among apparel manufacturers in New York City and State. Over the three year period January 1, 1974 to January 1, 1977, more than 2000 of the approximately 8000 firms in this industry in New York went out of business, reflecting a mortality rate of 24.9%. The number of firms that closed during this period ranged from a high of 902, or about 11.2% of all New York apparel firms in 1975 to a low of 424, or 5.6% of all apparel firms in 1976. During the same three year period, a total of

1460 new firms came into the New York apparel industry representing 19% of the 7702 firms in the industry in 1977.*

Although the participants in the Fund are employed by manufacturers, jobbers and contractors, contributions to the plan are, for the most part, paid only by manufacturers and jobbers.* Manufacturers and jobbers both pay contributions to the Fund based upon a percentage (currently 8.75% in most cases) of the wages paid to covered employees. Contractors, which are engaged in the sewing of garments under contract with a manufacturer or jobber, generally do not pay contributions to the Fund. Instead, the manufacturer or jobber for whom a contractor is working generally contributes to the Fund 6.5625% of all payments made to the contractor. This payment is calculated to produce a contribution of 8.75% on the wages paid by contractors to their employees.

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*State of New York, Department of Labor, New York State Unemployment Insurance Tax Rates, 1975-77, tables 3A, 3B, and 3C (1980).

*A manufacturer operates his own production facility known as an "inside shop." The garments are made by his own employees from materials furnished by him. He maintains his own showroom and warehouse, and sells the completed garments directly to wholesalers or retailers. If a manufacturer has more work than he can handle, he may send some of the excess to one or more contractors. Some manufacturers operate only an "inside shop," and others contract out excess work.

A jobber has neither production facility nor production employees. He obtains orders for finished garments, and then has the work done by one or more contractors. He has his own showroom and warehouse, and sells the completed garments to wholesalers or retailers.

A contractor maintains a production facility, where he employs workers to make garments for jobbers and manufacturers. He operates on a contract basis. As a rule, the textiles are supplied by the jobbers and manufacturers, who also furnish the necessary designs.

II. *Need for Special Withdrawal Liability Rules*

A. *Frequent Entry and Withdrawal of Firms Does Not Erode the Contribution Base*

The garment industry is characterized by a large number of small firms. Capital requirements for entry into the business are slight and within the course of a given year, five to ten percent of the firms whose employees are covered by the Fund may go out of business. The withdrawal of a particular firm from the industry is generally caused either by business failure, or by retirement of the employer. The production lost by a terminated company is normally replaced either by the growth of other firms or by the entry of new firms into the industry.

The growth and decline of particular segments of this industry is illustrated by Bureau of Census measurements. During the five year period of 1974-1979, the physical volume of *all types* of output in the women's and children's apparel industry was relatively stable, amounting to about $8.36 billion in 1974 and $8.01 billion in 1979, measured in 1967 dollars.* During the same period, however, the unit production of blouses *increased* by about 38%, from a unit production of 245 million in 1974 to 338 million in 1979, while dress production *declined* by 15% (from 237 million to 201 million) and sweater production declined by 24% (from 81 million to 62 million). Production of skirts increased by 16% but production of slacks declined 11%. Market changes of this type cause certain employers to go out of business while other em-

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*Measured in current dollars, the value of garment shipments increased during this period by about 31%, from $12.06 billion to $15.77 billion.

ployers are growing and expanding, but these changes do not indicate any permanent impairment of the Fund's contribution base.

Significant fluctuations occur over much shorter periods. From the first four months of 1979 to the first four months of 1980, there was virtually no change in the physical volume of output in the industry as a whole. Measured in 1967 dollars, physical volume was about $2.64 billion in the first four months of 1979 and $2.66 billion in the first four months of 1980. During this same period, however, production of skirts increased by about 25.6% and production of suits declined by 16.9%. The decline of suits, and of knit-goods as a whole, resulted in a large number of employers going out of business, but the lost volume was replaced in other areas of the industry.

Market changes from year to year are even more dramatic at the level of particular employers. For example, the five largest contributors to the Fund in 1979 made contributions of approximately $6.216 million in 1979 and $8.312 million in 1980.* The same five firms contributed $1.325 million in 1975. The contributions to the Fund by these five companies in 1980 amounted to 627% of their contributions five years earlier.

The women's and children's clothing industry is unique among major American industries in the extent to which it is based upon fashion. Unlike the men's clothing industry, where style changes are gradual, women's clothing styles change rapidly from year to year and season to

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*This statistic does not include affiliated companies since the Fund's records were not previously maintained on a basis which consolidated the different divisions and affiliates of a given employer.

season. A producer of women's garments may have popular designs one year but go out of business the next due to failure to anticipate a change in fashion. As a result, the existence of many individual firms is highly tenuous, even though the industry as a whole is quite stable.

At the same time that employers with unpopular designs are going out of business, other firms are greatly increasing their production and sales. To a significant extent, a garment firm works on a project to project basis —it undertakes large scale production of garments as orders are received from garment buyers. At the start of a season, a firm will make up sample lines for exhibit to buyers. The extent to which these lines will be manfactured is determined by the orders placed.

The ability to increase production greatly on short notice is provided by a system whereby jobbers and manufacturers, who design and sell garments, farm out the actual manufacture of the garments to small contracting shops. About half of the current participants in the Fund are employed by such contractors. The employment of these workers may be irregular and intermittent, since it is dependent upon the placement of orders by a jobber for a particular line of garments. Since production of many garments is intermittent, a firm may temporarily close down between one season and the next. However, if orders fall off from one jobber, the contractor's employees may not be affected if the contractor can obtain an order from some other more successful jobber or manufacturer.

The practice of relying on contractors for production of garments means that if a particular manufacturer has a successful line of garments one year, it can greatly increase its population, sales, and Fund contributions by

hiring contractors. A less successful jobber or manufacturer may use fewer contractors or even close down completely. By the same token, a firm that is unable successfully to market its spring 1981 styles may come back with an extremely successful line the next season or year. For this reason, it is virtually impossible to determine whether a firm which becomes inactive has "permanently ceased all operations" or is only temporarily dormant. The answer to this question is often dependent upon future changes in clothing fashions.

The project-by-project nature of employment and the high mortality rate of employers combine to produce a shifting labor force. When one employer closes down or reduces production, the workers generally shift to a different firm. As a result, neither the total employment in the industry nor the contributions to the Fund are affected by the closing of a particular employer.

B. *Imposition of Liability for Normal Withdrawal Is Not Appropriate*

In the women's and children's garment industry, the imposition of withdrawal liability is not appropriate for normal cases of retirement or business failure. Because of the fluctuations of style and the high turnover of participating employers, an employer's share of unfunded vested liabilities cannot fairly be measured by contributions over a five year period. More importantly, a particular employer's withdrawal from the Fund does not reduce the plan's contribution base and therefore is not an appropriate occasion for imposition of withdrawal liability. This circumstance is noted in the reports of both House and Senate committees as the key factor which

led Congress to enact special withdrawal liability rules for the construction and entertainment industries.

As noted in the report of the House Committee on Education and Labor

> "[T]he volume of work for a given employer will often fluctuate greatly from year to year. These normal events do not pose an undue threat to the plan as long as contributions are made for whatever work is done in the area. Therefore, the construction industry exception is designed to impose liability only on former contributors that continue to work within the plan's area. It exempts from liability employers that cease contributions because they have no work in the area: there is no liability when a company goes out of business, is sold, or is simply without work for a time." H.R. Rep. No. 96-869, Part I, Report of House Committee on Education and Labor, 96th Cong., 2d Sess., p. 75 (1980).

Similarly, the Joint Explanation of the Senate Committees explains the rationale of the construction industry exception as follows:

> "The bill includes a special definition of withdrawal for the building and construction industry. The Committees believe that the special definition is warranted because in view of the nature of the industry, it provides substantial protection for the affected plans. For instance, an employer's leaving the jurisdiction of the plan or going out of business does not typically reduce the plan's contribution base. Rather, an employer reduces the plan's contribution base only if it continues to do what would have been covered

work but does not have an obligation to contribute to the plan for that work. In order to protect the plan, that continuation of work without contributions is treated as a withdrawal in these industries." Joint Explanation of S. 1076, Submitted by Senators Long and Williams, Chairmen of the Committees of Finance and Labor and Human Resources, 126 Cong. Rec. S 10111, S 10116 (daily ed. July 29, 1980) (emphasis supplied).

Because of the special characteristics of the Ladies Garment Industry, extension of a construction industry-type rule is unanimously supported by the twelve union and employer members of the Executive Committee of the Board of Trustees. Both Labor and management representatives believe that their industry will be severely—perhaps irreparably—harmed unless special withdrawal liability rules are approved.

Due to the frequency with which employers, by choice or necessity, close their businesses and retire, the stability of the industry is dependent upon the entry of new firms to replace the 500 or more employers which regularly go out of business every year. New firms are unlikely to enter into the garment industry if withdrawal liability will be imposed in the event of retirement or business failure.* In addition, strict application of the statutory definition of withdrawal is likely to cause a drainage of capital out of the industry as employers who anticipate the possibility of future retirement or business

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*Potential new employers in this industry are unmoved by the argument that new employers are responsible only for future increases in unfunded liability. In an industry with more than 8000 contributing employers, no one employer has any control over the possibility of future benefit increases.

failure (i.e., virtually all employers) reduce the capitalization of their firms to guard against withdrawal liability. The combination of these factors (reluctance of new employers to contribute to the Fund and reduced capitalization of existing employers) will combine to spur the growth of the portion of the industry which is not organized and which does not support and maintain the Fund.

The employer representatives on the Board of Trustees represent, to a significant extent, the larger and more stable employers in the industry. They understand that if withdrawal liability is not collected from employers that go out of business, they as continuing employers must, with the help of new employers, amortize the Fund's unfunded vested liabilities. Under these circumstances, in the judgment of those most familiar with the Fund, the Fund's contribution base can best be preserved and extended by the adoption of special withdrawal liability rules similar to the rules applicable to the construction industry. Any other alternative would be detrimental to the Fund, unsettling to the collective bargaining process, and dangerous to the segment of the industry that supports and maintains the Fund.

The imposition of withdrawal liability in the event of retirement or business failure should not apply to the Fund in light of the fact that 5% to 10% of the participating employers regularly withdraw from the Fund every year without causing a decline in covered employment. Such normal withdrawals are not prejudicial to the Fund or the industry, but merely reflect the impact of retirement and competition in an industry which, as a whole, is stable and continuing even though the con-

tinuation of any particular firm is dependent upon the vagaries of fashion.

The trustees of the ILGWU National Retirement Fund intend to submit a detailed application to the corporation as soon as possible in order to provide greater information about the application of the Act to the Fund and the conditions and limitations which would be appropriate in connection with any special withdrawal rules under section 4203(f). In submitting the application, the trustees intend to propose rules to protect the Fund by imposing withdrawal liability in those cases where a complete or partial withdrawal would impair the contribution base of the Fund.

Thank you for your consideration of the problems described above.

Sincerely,

/s/ Stephen L. Hester
Stephen L. Hester

/s/ K. Peter Schmidt
K. Peter Schmidt

cc: Theodore Bernstein, ILGWU National Retirement Fund

APPLICATION TO THE PENSION BENEFIT GUARANTY CORPORATION ON BEHALF OF THE ILGWU NATIONAL RETIREMENT FUND

May 7, 1982

ARNOLD & PORTER
1200 New Hampshire Avenue, N. W.
Washington, D. C. 20036
(202) 872-6700

May 7, 1982

Pension Benefit Guaranty Corporation
Division of Case Classification and Control
Office of Program Operations (542)
2020 K Street, N.W.
Washington, D.C.

Gentlemen:

By letter dated June 11, 1981, the ILGWU National Retirement Fund (the "Fund") stated its intention to apply for approval of an amendment imposing special withdrawal liability rules. On December 9, 1981, the Fund trustees adopted such an amendment, contingent on PBGC approval. Pursuant to the regulations recently promulgated by the PBGC under ERISA sections 4203(f) and 4208(e)(3) (29 C.F.R. §§ 2645.1 *et seq.*), the Fund hereby applies for PBGC approval of its special withdrawal liability rules.

This application describes the Fund, the industry it covers, the special rules for which approval is sought, and the reasons that PBGC approval should be granted. The application includes as Exhibit A the information required by section 2645.3 of the regulations.

A. *The Fund*

As of January 1, 1981, the Fund was paying benefits to 104,504 pensioners and survivors. The maximum bene-

fit provided by the plan is currently $120 per month,[1] which is paid to workers who become disabled or who retire at normal retirement age with twenty or more years of covered service.

The Fund is economically healthy, with current assets at January 1, 1981, valued at actuarial book value, in excess of $340 million. For purposes of computing withdrawal liability, unfunded vested benefits as of the same date were approximately $1,080 million.

Contributions to the Fund have increased steadily over the last seven years. In 1981 contributions totalled nearly $154 million as opposed to $57 million in 1975. Contributions for 1981 exceeded the funding requirements of ERISA by nearly $32 million. Contributions to the Fund have exceeded funding requirements in a number of recent years and the Fund expects a 1981 credit balance in its funding standard account in excess of $100 million.

At the current contribution level, all benefit obligations will be fully funded within twenty years, assuming no benefit increases or changes in actuarial assumptions. In fact, contribution levels are expected to rise, since Fund contributions are based, directly or indirectly, on a percentage of payroll, and increased wage rates automatically result in increased contribution rates.

As of January 1, 1981, the Fund covered approximately 270,000 active workers. Although the number of active workers has decreased over a period of time, this decrease has not adversely affected the contribution base of the Fund. In the period 1970-1981, total covered pay-

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1. A small percentage of covered workers can qualify for a wage-related benefit of up to $150 per month.

roll increased from $1.5 billion to $1.9 billion.[2] This increase in covered payroll produces an increase in contributions even if the contribution rate remains constant. Since contribution rates have increased in recent years, the combination of a rising contribution base and increased rates of contribution have produced sharply rising contributions to the Fund.

Contributions to the Fund are paid primarily by jobbers and manufacturers,[3] based on a percentage of payroll. Current collective bargaining agreements generally provide for manufacturers and jobbers to contribute to the Fund an amount equal to 8.75 percent of the wages they pay to covered employees. Contractors, which are engaged in the sewing of garments under contract with a manufacturer or jobber, generally do not pay contributions to the Fund. Instead, the manufacturer or jobber

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2. Attached as Exhibit B is a chart showing total contributions to the Fund and the average rate of contribution for each year from 1970 through 1981.

3. A manufacturer operates his own production facility known as an "inside shop." The garments are made by his own employees from materials furnished by him. He maintains his own showroom and warehouse, and sells the completed garments directly to wholesalers or retailers. If a manufacturer has more work than he can handle, he may send some of the excess to one or more contractors.

A jobber generally has no sewing facilities. He may, however, employ a few "sample hands," to make samples from his designs. He may also employ a small number of "cutters," who cut the jobber's material for shipment to a contractor for completion of the manufacturing process. Jobbers have their own showrooms and warehouses, and sell completed garments to wholesalers or retailers.

A contractor maintains a production facility, where he employs workers to make garments for jobbers and manufacturers. He operates on a contract basis. As a rule, the textiles are supplied by the jobbers and manufacturers, who also furnish the necessary designs. The contractor may or may not cut the materials furnished by the jobber or manufacturer.

for which a contractor is working is generally required to contribute a percentage (currently 6.5625 percent) of all payments made to the contractor. A contribution equal to 6.5625 percent of all payments to a contractor is equivalent to 8.75 percent of the wages paid by the contractor to its employees. Thus, all contributions to the Fund are tied to wage levels in the industry.

B. *The Industry*

1. *Scope*

The Fund covers workers throughout the United States, including Puerto Rico, in all areas of the women's and children's garment industry.[4] Since most contributing employers make only certain types of garments, a number of distinct subindustries are covered by the plan, including sportswear, skirts, dresses, coats and suits, underwear and lingerie, blouses, girdles and brassieres, knitted outerwear, snow suits, children's outerwear, rainwear, knitted underwear, accessories, embroideries, and other products.

2. *The Role of Fashion*

The ladies' garment industry is unique because of the pivotal and unpredictable role of fashion. The output of a manufacturer or jobber is not stable, but fluctuates in response to the success or failure of his current designs for each of the five recognized "seasons" in the industry. In order to cope with fluctuations in sales and output, the industry has evolved a unique production and distribution system which allows jobbers and manu-

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4. Attached as Exhibit C is a chart showing the approximate number of garment workers covered by the Fund in each state and in Puerto Rico.

facturers to increase or decrease their production very quickly by utilizing the services of contractors.

a. *Competition among individual producers*

The women's and children's garment industry is highly competitive, with many buyers and many sellers.[5] Competition among wholesalers occurs in a setting that provides ample opportunity for buyers to shop for fashion, quality, and price. Indeed, by attending regional shows in merchandise marts and other facilities around the country, buyers can review the offerings of scores or even hundreds of different jobbers and manufacturers in a few days.

Sample garments are also displayed in showrooms maintained by manufacturers and jobbers. Showrooms are frequently located in close proximity to each other, permitting buyers to view the wares of a large number of manufacturers in one buying trip. In New York City, for example, thousands of jobbers and manufacturers have permanent showroom space in the "garment center."[6] This is a year-round trade show where each season of the fashion year, from morning to night, manufacturers and jobbers host buyers from around the world. During market week, buyers intent on satisfying their own par-

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5. Attached as Exhibit D is an advertisement from Women's Wear Daily which sets forth the dates that the 1982 Spring collections of various high-fashion New York producers became available for viewing. The advertisement lists over 150 producers, many of which are competing for precisely the same market segment.

6. In buildings at 498, 520 and 550 Seventh Avenue, over 350 "better" dress manufacturers and jobbers have showrooms. At 1400 Broadway approximately 400 "popular priced" dress lines are being offered as are the products of nearly 2,000 children's manufacturers or jobbers at 112 W. 34th Street.

ticular tastes "shop" the showrooms—sometimes just looking, sometimes rejecting and sometimes ordering from samples on display.

In this competitive marketplace, success in one season is not a guarantee of success in the next, and there is always an opportunity for new firms to win orders. Indeed, relatively few manufacturers or jobbers make apparel for "inventory," since they cannot be sure their lines will sell. The samples are the manufacturer's investment in possible orders, which, if "written," result in sales and the production of garments.

Manufacturers must compete on an ongoing basis, from year to year and from season to season, trying to keep pace with shifts in consumer preference. A full-line producer will show garments for each season,[7] but a successful spring line may be followed by a summer line that sells very poorly. Similarly, a spring line that sells well one year may fail the next. Fluctuations of this type account for the high attrition rate in the industry, but are not necessarily detrimental to the Fund, since sales that are lost by one producer will generally be picked up by another.

b. *Competition between industry subgroups*

Fashion is responsible not only for shifts in demand as between similar garments of different manufacturers,

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7. The industry generally recognizes five seasons: Fall I, Fall II, Holiday/Resort, Spring, and Summer. Fall I includes "transition clothes," i.e., darker tones and heavier weights than summer, but less heavy than the Fall II tweeds and woolens that would generally be worn with coats. Holiday/Resort includes dressy clothes for the Holiday season and other more formal occasions; it also includes clothing for warm-weather, winter vacations.

but also for shifts as between whole segments of the industry. The growth and decline of particular industry segments are illustrated by Bureau of Census measurements. During the six-year period January 1, 1974 to January 1, 1980, the physical volume of *all types* of output in the women's and children's apparel industry was relatively stable, amounting to about $8.36 billion in 1974 and $8.01 billion in 1979, measured in 1967 dollars.[8] During the same period, however, the unit production of blouses *increased* by about 38 percent, from a unit production of 245 million in 1974 to 338 million in 1979, while dress production *declined* by 15 percent (from 237 million to 201 million) and sweater production declined by 24 percent (from 81 million to 62 million). Production of skirts increased by 16 percent but production of slacks declined 11 percent. Market changes of this type cause certain employers to go out of business while other employers are growing and expanding, but these changes do not impair the Fund's contribution base.

Significant fluctuations and shifts between industry segments can occur over very short periods. From the first four months of 1979 to the first four months of 1980, there was virtually no change in the physical volume of output in the industry as a whole. Measured in 1967 dollars, physical volume was about $2.64 billion in the first four months of 1979 and $2.66 billion in the first four months of 1980. During this same period, however, production of skirts increased by about 25.6 percent and production of suits declined by 16.9 percent. The decline of suits, and of knitgoods as a whole, resulted in a large

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8. Measured in current dollars, the value of garment shipments increased during this period by about 31%, from $12.06 billion to $15.77 billion.

number of employers going out of business, but the lost volume was replaced in other areas of the industry.

3. *Garment Production and Distribution*

A unique production and distribution system has been developed to cope with the fluctuations in the level of individual wholesalers' output. Manufacturers and jobbers generally make up samples of their lines, for the purpose of obtaining orders to be filled by later production. The samples are displayed to potential customers in showrooms maintained by the manufacturer, at regional shows in which many manufacturers participate, and on the customer's premises by manufacturers' sales representatives. Thus, for the most part, production is on a project-by-project basis. If a sample does not sell, that garment is not produced or is produced in very limited quantities. Just as a particular sample garment may not sell, an entire line may fail to attract significant orders.

Where one producer fails to sell his line, and loses business to another, the latter is able to expand production through the contractor system. As noted earlier, contractors do not design garments or sell them, but produce garments according to the specifications and design of jobbers and manufacturers, using materials provided to them. About 58 percent of the current participants in the Fund are employed by contractors.

The employment of a contractor's workers can be irregular or intermittent, since the contractor's work is dependent upon the placement of orders by a jobber for a particular line of garments. However, so long as the lost production for one jobber is replaced by production for another whose sales are increased, there will be no adverse effect on the Fund.

Since production of some garments (*e.g.*, swimyear is intermittent, a contractor's firm may even close down between one season and the next. In some areas, it is common for a worker to be employed by the same series of seasonal contractors each year.

4. *Employer Turnover*

The competitive nature of this industry and the fluctuations in sales attributable to changes in fashion combine to cause a high attrition rate among employers in the women's and children's garment industry. A recent report by the New York State Department of Labor demonstrates the high degree of turnover among apparel manufacturers in New York City and State. Over the three-year period January 1, 1974 to January 1, 1977, more than 2,000 of the approximately 8,000 firms in this industry in New York went out of business, reflecting a mortality rate of 24.9%. The number of firms that closed during this period ranged from a high of 902, or about 11.2% of all New York apparel firms in 1975 to a low of 424, or 5.6% of all apparel firms in 1976. During the same three-year period, a total of 1,460 new firms came into the New York apparel industry representing 19% of the 7,702 firms in the industry in 1977.[9]

Competitive factors and the impact of fashion affect both large and small companies in this industry. One of the industry's largest manufacturers—the Fund's tenth largest contributor in 1980—recently filed a petition for reorganization under Chapter XI of the Federal Bankruptcy Act. Women's Wear Daily identified the following

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9. State of New York, Department of Labor, New York State Unemployment Insurance Tax Rates, 1975-77, tables 3A, 3B and 3C (1980).

as a principal factor in the company's difficulties: "An inability to update fashions quickly and with a decisive flair . . . ."[10] The article pointed to a failure of this "juniors market" manufacturer to respond adequately to "the evolution of the junior customer from a bubble gum popping teeny bopper who wanted to dress just like her peers to an older quality-conscious shopper not necessarily in her teens."[11]

As noted earlier, the misfortunes of one employer are generally offset by new entrants into the marketplace or growth in existing employers. For example, one employer who had made approximately $170,000 in contributions in 1975 grew to the point by 1980 that its contributions were over $2,000,000. The Fund has maintained its contribution base because new employers and increased production from old employers take up the slack created by business failures or significant reductions in production.

Business failure and fluctuations in output are not restricted to small companies but also affect the largest contributors to the Fund. Eighteen of the fifty largest contributors to the Fund in 1975 were no longer among the top fifty in 1980. By the same token, eighteen of the fifty largest contributors in 1980 were not among that

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10. Women's Wear Daily, Jan. 29, 1982 at 1, 24.

11. Fluctuations can be severe even where they are not enough to send an employer into bankruptcy. One large women's apparel maker recently reported a leap in third quarter revenues to $75.8 million from a $42 million level the preceding year. Net income was over $44 million contrasted with a deficit of over $4 million in the preceding year. Again, fashion was responsible, the company citing an explosion in its designer line. Wall Street Journal, Oct. 29, 1981 at 4. *See also* Exhibit E, a recent article analyzing the adverse effects on two major manufacturers, Jonathan Logan and Leslie Fay, of a shift in public demand from knit to woven goods.

group in 1975. Between 1975 and 1980, dropouts from this group included four of the largest twelve contributors from 1975. Three of these four are now out of business. The fourth suffered a decline in contribution base units over this period of approximately 79 percent.

One top-fifty employer was the seventh largest contributor in 1975, twenty-third in 1976, out of the top fifty in 1977, twenty-fifth in 1978, and off the list again in 1979 and 1980. Another employer, riding the fashion wave in the other direction, was the twenty-first largest contributor in 1975, twentieth in 1976, seventh in 1977, fourth the next two years, and third in 1980.

Despite the existence of a few large contributors, the garment industry as a whole is characterized by a large number of small firms. From 1970 through 1977, establishments making apparel and related garments in the United States employed, on average, fewer than sixty people, with nearly half of the establishments employing fewer than twenty.[12] Fewer than twenty-five firms in the entire industry—out of the Fund's approximate 8,000 employers—made contributions during 1980 for 1,000 or more workers.[13]

Capital requirements for entry into the business are slight and, within the course of a given year, five to ten percent of the firms whose employees are covered by the Fund may go out of business. The withdrawal of a par-

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12. Extracted from County Business Patterns, 1970-1977, U.S. Dept. of Commerce, Bureau of the Census.

13. This statistic was derived by dividing a firm's total contributions by the contributions ($512) that would be made, at an 8 percent rate, on the industry's estimated, average, annual salary ($6,400). Average annual salary was estimated by dividing total estimated covered payroll (*i.e.*, the Fund contribution base) by the number of active workers covered by the Fund.

ticular firm from the industry is generally caused either by business failure, or by retirement of the employer. As discussed above, however, the production lost by a terminated company is normally replaced either by the growth of other firms or by the entry of new firms into the industry.

5. *Transitory Nature of Employment*

Due to the role of fashion and the structure of this industry, a garment employee generally works for many different jobbers, manufacturers, and contractors over his or her career.[14] Even a participant who works only for one contractor is very likely to have contributions paid by a number of jobbers or manufacturers. An accurate measure of employment turnover must therefore take account not only of shifts by an employee from one contractor to another but also of the frequent occasions on which the contractor itself shifts from one jobber to another. Recent data concerning holiday pay programs that cover workers in contracting shops in this industry indicate that the average contractor received work from three or more jobbers of manufacturers during fiscal year 1981.[15] Thus, the typical worker who has been with one

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14. A survey of 10 percent of the 8,000 retirees applying for benefits in 1980 showed that, on average, an employee worked for more than five direct employers during his period of covered employment. The survey included a number of retirees with relatively little covered service. Ten years of covered service is enough to qualify a participant for a benefit. If the survey had been limited to those with life-long service, the average number of employers for which retirees had worked would likely be substantially greater.

15. There is no such data for the National Retirement Fund itself. Holiday pay programs, for which data has been compiled, pay workers for certain holidays guaranteed them by their con-

(Continued on following page)

contractor throughout the year may have had contributions paid to the fund by three or more jobbers or manufacturers.

Workers employed by only a small number of contractors may also have a large number of job changes. For example, an employee may work for different contractors during each season, even though, for any given season, he works for the same contractor year after year. Thus, he may work for one contractor every year making swimsuits, and for another each year making jackets.

C. *Rules for Which Approval Is Sought*

On December 9, 1981, the Fund's Trustees adopted the trust amendment appended as Exhibit F. The amendment provides, subject to PBGC approval, for special withdrawal liability rules similar to those that apply in the construction and entertainment industries. In general, an employer contributing to the Fund for the production of garments would have a complete or partial withdrawal only where it thereafter sold, manufactured or distributed garments for which no contributions were made.

An employer who simply goes out of business, *e.g.*, through retirement or business failure, will not generally impair the Fund's contribution base. Rather, the garment

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Footnote continued—

tracts, and cover, in the aggregate, most of the work for which contributions are also made to the Fund in the Northeast area. Unlike the Fund itself, particular holiday pay programs generally cover only a specific segment of the industry, *i.e.*, rainwear, infant clothing, dresses, sportswear, etc. Because some employers participate in more than one program, the aggregate data, from which the textual conclusion above was drawn, may count some jobbers and contractors more than once. Nonetheless, the Fund believes that this data is substantially accurate and is representative of what would be shown by data, if available, for the Fund itself.

sales he no longer makes will be made in the future by other contributing employers. Such an employer takes no part of the industry or the Fund's contribution base with him when he withdraws; rather, he leaves his share to other, competing contributors.

Where an employer *does* take a piece of the industry with him, by continuing to compete on a noncontributory basis, there is damage to the Fund's contribution base. In such situations, the Trustees believe that withdrawal liability is both appropriate and necessary. For this reason, the rule adopted by the Fund would distinguish, as do the construction and entertainment industry rules, between withdrawals that impair the Fund's contribution base and those that do not.

The rule referred to above would provide significant protections to the Fund and the insurance system not present in the construction or entertainment industries. In the construction industry, for example, there is a partial withdrawal only if the employer's contribution obligation is continued for "no more than an insubstantial portion of its work" in the jurisdiction of the collective bargaining agreement.[16] Thus, an employer might incur a 70 or 80 percent reduction in covered employment without liability, even though the employer also had noncontributory work in the jurisdiction. Under the Fund's rule, by contrast, there *would* be liability where a statutory partial withdrawal was followed by prohibited activity, *i.e.*, the sale, manufacture or distribution of garments for which no contributions were made. The only circumstance where this partial withdrawal rule would not apply is where the

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16. ERISA § 4208(d)(1). There is no partial withdrawal liability at all in the entertainment industry, except to the extent prescribed by the PBGC. ERISA § 4208(d)(2).

employers' importing activities did not increase, so that the industry's sales base would not be undermined by any activity of the withdrawn employer.

In the construction and entertainment industries, the sale of an employer's business to a noncontributor would not generally produce liability to the seller. Under the Fund's rule, by contrast, such a sale would produce liability whether or not the seller retained any connection to the business sold.

In the construction industry, an employer could go out of business in the jurisdiction of a New York City plan, and continue in or commence business in another—Phoenix for example—without making contributions to the New York City (or any other) plan. Under the Fund's rule, by contrast, a garment manufacturer would have liability if he went out of business in New York and began manufacturing garments in Phoenix on a noncontributory basis.

Finally, the Fund's rule on complete withdrawal would not apply to an employer who accounted for ten percent or more of total Fund contributions in two of the three years preceding withdrawal.

D. *Reasons That PBGC Approval Should Be Granted*

1. *The Need for a Special Rule*

The special withdrawal liability rules described above enjoy the overwhelming support of the Fund's trustees. These trustees recognize that assessing withdrawal liability against employers who retire or go out of business *might* produce revenues that would reduce unfunded liabilities.[17]

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17. Many trustees have serious doubts, however, about the ability in this industry to collect as much from withdrawn employers as the collection efforts would cost.

They also understand that to the extent withdrawal liabilities could be collected, these collections would reduce the funding burden of the remaining contributors. Despite this fact, the employer and employee trustees believe that any gains from withdrawal liability collections will be more than offset by the loss of potential contribution collections from new or expanding employers that would otherwise affiliate with the Fund.

The statistics show that employers in this industry, by choice or necessity, have a high rate of attrition. Historically, new or expanding firms have replaced the 500 or so employers that go out of business in an average year. Unfortunately, the withdrawal liability rules currently applicable to the Fund are likely to impede the replacement of contributors that withdraw.

First, a potential new firm may be less likely to enter the garment industry. As described earlier, the cost of entering this business is relatively low, but the attrition rate is relatively high. If business failure entails the imposition of withdrawal liability—a liability for which even *nongarment* trades or businesses under common control are also liable—an entrepreneur will be that much less likely to enter the business in the first place.[18]

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18. Potential new employers in this industry are unmoved by the argument that new employers are responsible only for future *increases* in unfunded liability. However, in an industry with more than 8,000 employers, no one employer has any control over the possibility of future benefit increases. Moreover, small businessmen, who constitute a large percentage of Fund contributors, tend to be highly suspicious of technical explanations of such matters as why a generally applicable liability provision will not affect them adversely. The Fund's special rules provide a simple, reassuring answer to these concerns.

Second, a person who does enter the garment industry will be more likely to resist coverage under a collective bargaining agreement requiring Fund contributions. This resistance may erode the Fund's base of contributing employers.[19]

Third, existing, successful employers may forego business expansion since additional contribution obligations could increase their potential withdrawal liabilities. Any disincentive to business expansion will necessarily have an adverse impact on the Fund's contribution base.

Fourth, it may be more difficult to sell or refinance marginal or growing businesses for which contributions are already being made.[20] This could result in the stagnation or failure of businesses that otherwise might be carried on, expanded or revitalized.

Fifth, many small contributors are now exempt from liability because of the *de minimis* provisions of the law. A significant number of these employers may withdraw to avoid the liability to which they could be exposed if their businesses prospered and grew. A large percentage of the Fund's 8,000 employers are small busi-

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19. Since virtually all ILGWU contracts now require Fund contributions, the prospects for signing an agreement without pension coverage are doubtful. However, demands for such agreements may cause labor unrest and could itself result in fewer new contributors.

20. See the March 11, 1982 Senate Labor Subcommittee testimony of Morton Metzger regarding S. 1748. Mr. Metzger, a New York coat manufacturer, described a request from another coat manufacturer for investment of additional capital. The company in question had a volume of approximately $3,000,000 and employed fifty to seventy-five people. Mr. Metzger declined, on the following basis:

> "Since, based on the company's volume of business, I believed its value was less than [its estimated, potential withdrawal liability], I simply decided against the investment."

nesses currently free from withdrawal liability under the *de minimis* provisions of the statute.

Finally, strict application of the statutory definition of withdrawal is likely to cause a drainage of capital from this industry as employers who anticipate the *possibility* of future retirement or business failure (*i.e.*, virtually all employers) reduce the capitalization of their firms to guard against withdrawal liability.

The combination of these factors (reluctance of new employers to contribute to the Fund and the possible withdrawal or reduced capitalization of existing employers) will, in the view of the Fund's trustees, hamper the growth of the industry and thereby impair the funding of this plan.

In short, the statutory withdrawal liability rules are likely to injure, rather than protect, this Fund under the special circumstances of the women's and children's garment industry. Just as this industry and its unique needs fostered, in earlier times, the development of novel employment and bargaining arrangements, as well as special treatment under various state and federal laws,[21] the industry has now come together in formulating special withdrawal liability rules. These rules are respon-

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21. We note the existence of other laws in which the construction and ladies garment industries have been singled out for similar, special treatment. The New York State Unemployment Law, for example, which generally assesses premiums on the basis of experience ratings, permits the payment of premiums in these two industries at a flat, statutory rate. N.Y. Labor Law § 581 (McKinney 1982). Similarly, "hot cargo" agreements, while prohibited generally by federal labor laws, are explicitly permitted in the construction and apparel industries. *See* section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e). Sections 8(f) and 8(b)(4) of this Act provide, for the construction and apparel industries respectively, additional exceptions from the generally applicable rules.

sive to the special needs of this industry, and would not produce the economic disharmony and turmoil already resulting from the statutory rules.

2. *The Statutory Basis for Approval*

Under ERISA section 4203(f)(1), the PBGC may prescribe regulations so that plans in industries other than construction or entertainment may be amended to provide for withdrawal liability rules similar to those applicable there. The statute also provides that special rules must be permitted only in industries with "the characteristics that would make use of such rules appropriate" and only where such rules will not pose a significant risk to the PBGC.[22]

The PBGC has noted the following characteristics that may be relevant to a determination of whether special rules are appropriate: the effect of withdrawals on the plan's contribution base, the mobility of employees, the intermittent nature of employment, the project-by-project or temporary nature of employer participation, the local nature of the work performed, and the existence or nonexistence of a consistent pattern of employer entry and withdrawal.[23] The extent to which the ladies garment industry shares these characteristics is set forth below.

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22. ERISA § 4203(f)(2).

23. 29 C.F.R. § 2645.3(d)(7). The potential relevance of of these characteristics is also noted in the legislative history of the Multiemployer Pension Plan Amendments Act of 1980. *See, e.g.*, H. Rep. No. 96-869, Part I, 96th Cong., 2d Sess. 75 (1980); Joint Explanation of S. 1076, submitted by Senators Long and Williams, 126 Cong. Rec. S1011, S10116 (daily ed. July 29, 1980). We note that the statute requires only that the industry have characteristics that would make use of special rules "appropriate." Thus, characteristics other than those of the construction industry itself, *i.e.*, project-by-project, mobile employment etc., may be relevant.

a. *Effect of Withdrawals*

As demonstrated earlier, the Fund's contribution base has increased steadily over the past twelve years, despite significant turnover among participating employers. Thus, withdrawals of the type for which no liability would be assessed have not adversely affected the Fund's contribution base.

b. *Intermittent or Temporary Employment*

Employment with any one employer is frequently of an intermittent or temporary nature, in part because the industry responds to fashion seasons. A contractor that makes swimsuits, for example, may make nothing else and therefore be active only on a seasonal basis. Moreover, since contractors are generally retained by a number of different jobbers or manufacturers, and the latter most often make the Fund contributions for the contractor's employees, a participant may have had contributions made by many more contributors that the number of his direct employers.

c. *Project-by-Project*

As noted above, industry buyers choose from the sample lines of hundreds of producers. If sufficient orders are received, additional garments are manufactured. Thus, employers operate on a project-by-project basis, with employment expanding or contracting to respond to the level of each employer's business at that time.

d. *Pattern of Entry and Withdrawal*

The consistent pattern of employer entry and withdrawal from this industry has also been demonstrated

above. During the three-year period beginning in 1974, approximately one quarter of the apparel manufacturers in New York State went out of business. Nearly the same number of new firms came into the industry during that period. The data on the Fund's largest contributors shows the turnover among this group. Those that make it to the top of this industry may not stay there long.

e. *Local Nature of Work*

There is significant geographical concentration, *e.g.*, in New York City, in the work covered by the Fund. However, such work is capable of being performed elsewhere, and the Fund's special rules would therefore impose liability on withdrawn contributors that compete *anywhere* against the Fund's employers.

CONCLUSION

For the reasons explained above, special withdrawal liability rules are necessary and appropriate in this industry. Those most familiar with the Fund believe that the statutory withdrawal liability rules create a risk to the Fund's contribution base and therefore to the insurance system as a whole. The vagaries of fashion and the highly competitive nature of this industry mean that contractions, expansions, and complete business cessations are less within the control of employers in this industry than they are in many others. Some employers will contract and others will go out of business regardless of what withdrawal rules apply. The industry believes that the special withdrawal rules the Fund has adopted will help to assure that the new and existing employers who pick up the slack will continue to do so on a contributory basis.

We will be happy to meet with you on this matter and to respond to any questions you may have.

Respectfully submitted,

/s/ Stephen L. Hester
Stephen L. Hester

/s/ K. Peter Schmidt
K. Peter Schmidt

APPENDIX BB

PENSION BENEFIT GUARANTY CORPORATION

Withdrawal of Request for Approval of Special Withdrawal Liability Rules; ILGWU National Retirement Fund

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of withdrawal of request for approval of special withdrawal liability rules for the ILGWU National Retirement Fund.

SUMMARY: This notice advises interested persons of the withdrawal of a request for approval of special withdrawal liability rules for the ILGWU National Retirement Fund (the "Plan"). Under section 4203(f) of the Employee Retirement Income Security Act of 1974, as amended. a multiemployer plan may establish special liability rules if the Pension Benefit Guaranty Corporation ("PBGC") finds that the rules apply to an industry that has the characteristics that would make use of the special rules appropriate, and that the rules would not pose a significant risk to the PBGC insurance program. On February 22, 1983, the PBGC published (at 48 FR 7526) a notice of pendency of a request from the Plan for approval of special withdrawal liability rules. The effect of this notice is to advise interested persons that the Plan has withdrawn its request for approval.

FOR FURTHER INFORMATION CONTACT: Thomas Veal, Director, Corporate Policy and Regulations Department (611), Pension Benefit Guaranty Corporations, 2020 K Street, N.W., Washington, D.C. 20006; 202-254-4833

(202-254-8010 for TTY and TDD). (These are not toll-free numbers.)

Issued at Washington, D.C., this 20th of March 1985.

Charles Tharp,
Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 85-7157 Filed 3-25-85; 8:45 am]

BILLING CODE 7706-81-M

APPENDIX CC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85Civ8822(EW)

THE BARBIZON CORPORATION,
Plaintiff and
Counterclaim Defendant,

v.

ILGWU NATIONAL RETIREMENT FUND,
SOL C. CHAIKIN AND
JOSEPH MOORE,
Defendants and
Counterclaim Plaintiffs.

PLAINTIFF AND COUNTERCLAIM DEFENDANT'S RESPONSE TO FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS PROPOUNDED TO PLAINTIFF AND COUNTERCLAIM DEFENDANT BY DEFENDANTS AND COUNTERCLAIM PLAINTIFFS

Plaintiff and counterclaim defendant, The Barbizon Corporation ("Barbizon"), hereby responds, pursuant to F.R.Civ.P. 33, to the First Set of Interrogatories and Requests for Production of Documents propounded to Barbizon by defendants and counterclaim plaintiffs, the ILGWU National Retirement Fund ("Fund"), Sol C. Chaikin and Joseph Moore (collectively, "Fund" or "defendants").

INTRODUCTION

* * *

Barbizon objects to the interrogatories cited below as follows.

1. Interrogatories 1-9, 12-15 and 21 do not seek the names of witnesses with knowledge or information relevant to the subject matter of the action.

2. Interrogatories 1-9, 12-15, and 21 do not seek the existence, custodian, location and general description of relevant documents or other physical evidence.

3. Interrogatories 16-20 seek the claims and contentions of the opposing party and may not be served until the conclusion of discovery unless the court has otherwise ordered.

4. Interrogatory 22 seeks the names of expert witnesses and the substance of their opinions before the conclusion of discovery.

Barbizon objects to interrogatories 1-15, 21, and Document Request 3 because they seek irrelevant information. Barbizon objects to Document Requests 1 and 2 to the extent they are linked to Interrogatories 1-15 and 21, because they seek, to that extent, irrelevant information.

Defendants' admissions narrow the issues to be decided in plaintiff's case to the single question. "Is Barbizon's Provo plant a "facility" under 29 U.S.C. 1397?" Consequently, only those facts which could lead to admissible evidence proving or disproving or tending to prove or disprove that Barbizon's Provo plant was a 29 U.S.C. 1397 "facility" have any relevance to the case. Neither statutory, regulatory nor judicial authority support the rele-

vance to the aforementioned issue of most of the information sought by defendants. "Facility" in 29 U.S.C. 1397 means a physically distinct, separate business unit. H. Rep. No. 869, Part II, 96th Cong., 2nd Sess., 18 (1980), [1980] U.S. Code Cong. and Ad. News 3007, *Meatcutters Local 88 Pension Plan v. Del Monte Supermarkets,* 565 F. Supp. 27 (E.D. Mo. 1983); *Richland Industries, Ltd. v. Robbins,* 617 F. Supp. 639 (N.D. Ill. 1985); PBGC Op. Letters 82-83 and 86-2. Therefore, trade-marks and trade-names, gross sales, the identity of contractors and their status as union or nonunion, and contractors' invoices to Barbizon, for example, have no relevance to the issues to be decided in this case.

Barbizon also objects to Interrogatories 1-15 and 23, and to the corresponding three Document Requests, because they assume an issue in dispute, namely, the date Barbizon closed its Provo, Utah facility or the date Barbizon withdrew from the Fund.

INTERROGATORIES

Interrogatory No. 1

1. Identify all trademarks and trade names which you used at any time:

   (a) during the two years preceding the closure of your factory in Provo, Utah, and

   (b) during the two years following the closure of the Provo factory.

Response to Interrogatory No. 1

Barbizon objects to Interrogatory No. 1 because Barbizon's trade-marks and trade-names have no relevance to

any issue to be decided in this case and for the reasons stated in the Introduction. Nevertheless, Barbizon answers as follows.

The only trade-mark or trade-name Barbizon used during the two years preceding and following the closure of the Provo facility was "Barbizon."

Interrogatory No. 2

2. State the dollar volume of gross sales for goods which you sold:

   (a) in each of the last two full-year accounting periods preceding the closure of the Provo factory, and

   (b) in each of the first two full-year accounting periods following the closure of the Provo factory.

   Your answer to this interrogatory should provide both the total gross sales by Barbizon for the relevant periods and the gross sales of goods from each factory operated by you and each contractor who manufactured clothing for you.

Response to Interrogatory No. 2

Barbizon objects to Interrogatory No. 2 because the dollar volume of goods which it sold has no relevance to any issue to be decided in this case and for the reasons stated in the Introduction. Nevertheless, Barbizon answers as follows.

The date Barbizon closed its Provo facility is in dispute except that the parties are in agreement that it closed prior to September 25, 1980. Therefore, Barbi-

zon is providing the dollar volume of its gross sales for the following fiscal years: $26,417,682 (fiscal year ending January 31, 1979); $28,669,579 (fiscal year ending January 31, 1980); $29,097,936 (fiscal year ending January 31, 1981); $33,843,422 (fiscal year ending January 31, 1982). Barbizon does not maintain information involving dollar volume of gross sales by factory or contractor.

Interrogatory No. 3

3. State whether you performed any work as a contractor by producing goods for any jobbers, and if so, state the total dollar amount of invoices submitted by you for any such work:

   (a) during the two years preceding the closure of the Provo factory, and

   (b) during the two years following the closure of the Provo factory.

Response to Interrogatory No. 3

Barbizon objects to Interrogatory No. 3 because the dollar value of any work invoiced by Barbizon to jobbers, if any, has no relevance to any issue to be decided in this case and for the reasons stated in the Introduction. Nevertheless, Barbizon answers as follows.

Barbizon did not perform any work as a contractor by producing goods for any jobbers.

Interrogatory No. 4

4. State whether you supplied cut materials to outside contractors for final manufacture, or otherwise engaged any outside contractors to manu-

facture clothing, and, if so, identify each such contractor and state the dollar amount of invoices submitted to you by each of those contractors for such work:

(a) during the two years preceding the closure of the Provo factory, and

(b) during the two years succeeding the closure of the Provo factory.

Response to Interrogatory No. 4

Barbizon's engagement, if any, of outside contractors for any reason has no relevance to any issue to be decided in this case; Barbizon therefore objects to Interrogatory No. 4, because it seeks irrelevant information and for the reasons stated in the Introduction. Nevertheless, Barbizon answers as follows.

The ILGWU Health and Welfare Fund audited Barbizon's books and identified outside contractors during fiscal years February, 1979 - January, 1980; February, 1980 - January, 1981; February, 1981 - January, 1982; February, 1982 - August 1982 and September 1982 - January 1983. The audit and other pertinent documents for the year February, 1978 - January, 1979 are unavailable. The available audits are served herewith and labeled "ILGWU Audits." Not included in the audits are "off shore," foreign contractors. All issues concerning Barbizon's contributions to the Fund were finally concluded in a stipulation and order for discontinuance or for entry of judgment in Case No. 83 Civ. 8052 (EW), previously before this Court, a copy of which is served herewith.

Interrogatory No. 5

5. Identify all factories operated by you and state the dollar volume of gross sales for goods manufactured at each such factory:

   (a) during the two years preceding the closure of the Provo factory, and

   (b) during the two years succeeding the closure of the Provo factory.

Response to Interrogatory No. 5

Barbizon objects to Interrogatory No. 5 because the gross sales of goods manufactured at Barbizon operated factories has no relevance to any issue to be decided in this case and for the reasons stated in the Introduction. Nevertheless, Barbizon answers as follows.

During the two years preceding the closure of the Provo facility, Barbizon did not operate any factories other than the Provo facility. After closing the Provo facility, Barbizon did not operate any factories until its Puerto Rico facility started production around March, 1982. Barbizon does not maintain dollar volume of gross sales for goods manufactured by factory.

Interrogatory No. 6

State whether, as a result of the closure of your factory in Provo, Utah:

(a) you changed the trademarks or names of any of your products or lines(s) of products or discontinued any products or lines(s) of products previously manufactured at your Provo factory;

(b) any changes were made with respect to (i) where and how finished garments are received or disposed of or (ii) the manner in which you market finished garments;

(c) any changes were made in your practices regarding the purchase of materials for use in manufacturing clothing;

(d) any changes were made with respect to any work done by you as a contractor for others; or

(e) any changes were made regarding your engagement of contractors to manufacture clothing.

Response to Interrogatory No. 6

Barbizon objects to this interrogatory because it seeks irrelevant information. Nevertheless Barbizon answers as follows.

(a) Barbizon's trade-mark and trade-name is irrelevant to this case. Barbizon did not change the trade-marks or trade-names of any products or lines of products or discontinue any products or lines of products previously manufactured at the Provo facility as a result of the closure of the Provo facility.

(b) Barbizon did not make any changes with respect to the manner in which it marketed finished garments as a result of closing the Provo facility. How Barbizon disposed or marketed its finished goods has no relevance to any issue in this case. Barbizon did make changes in where and how finished goods were received or disposed of as a result of closing the Provo facility.

(c) Barbizon changed its practices regarding the purchase of materials for use in manufacturing clothing as a result of closing the Provo facility.

(d) Barbizon has not done work as a contractor for others. Whether or not Barbizon operated as a contractor for others has no relevance to this case.

(e) Barbizon changed its practices regarding the engagement of contractors to manufacture clothing as a result of closing the Provo facility.

Interrogatory No. 7

7. If your answer to any subpart of the preceding interrogatory is yes, describe any such changes in detail.

Response to Interrogatory No. 7

Although this interrogatory seeks much irrelevant information, and although Barbizon objects to answering parts of it, Barbizon answers as follows.

Before Barbizon closed its Provo facility, Barbizon shipped its finished goods from Provo to its Montville, New Jersey distribution facility on its own trucks. After closing Provo, Barbizon used air and ground common carriers to ship goods to and from various contractors.

Regarding purchasing, Barbizon changed its use of suppliers as a result of closing the Provo facility. Barbizon previously purchased supplies from West Coast suppliers, including, but not limited to, office supplies, machinery, parts, bags, hangers, cartons, and threads. After closing its Provo facility, Barbizon purchased its supplies from East Coast suppliers. In addition, Barbizon estab-

lished a central inventory control at its Montville distribution facility. Barbizon shipped most supplies to the Montville distribution facility where, in turn, the supplies were shipped to the various contractors. These supplies include, in addition to the supplies previously mentioned, all raw material, such as trim, other than fabric.

Regarding the engagement of contractors, major changes occurred as a result of closing the Provo facility. Barbizon totally reorganized the manufacturing function. While open, Barbizon's Provo facility produced over 90% of the company's production. As a result of closing Provo, Barbizon used contractors for 100% of its production.

Barbizon hired field representatives to visit its contractors and changed the scheduling and quality control functions. These new salaried inspectors visited contractors to check and maintain quality, productivity and schedules. At the Provo facility, hourly-paid in-line inspectors, who were a part of the bargaining unit, carried out the quality control function.

Barbizon contracted out its cutting operation as a result of closing its Provo facility. Without its Provo facility, Barbizon shipped fabric to the contract cutter who in turn shipped the cut fabric to other contractors to complete the manufacture.

Interrogatory No. 8

8. State where and by whom materials were cut for final manufacture (a) at the Provo factory, (b) at any other factory or factories operated by you, and (c) by any outside contractor[s]. Your answer should separately state the requested information for (i) the two years preceding the

closure of the Provo factory, and (ii) the two years following the closure of the Provo factory.

Response to Interrogatory No. 8

Barbizon objects to Interrogatory No. 8 because it seeks irrelevant information and for the reasons listed in the Introduction. Nevertheless, Barbizon answers as follows.

During the two years preceding the closing of the Provo facility, Barbizon cut materials in-house at the Provo facility. During the two years following the closure of the Provo facility, Barbizon hired a contract cutter, Better Cutting in Scranton, Pennsylvania, to cut materials.

Interrogatory No. 9

9. State whether the closure of the Provo factory caused any changes in your practices regarding the cutting or supplying of materials, and, if so, describe in detail any such changes.

Response to Interrogatory No. 9

The closure of the Provo facility caused changes in how Barbizon cut materials. Prior to the closure, Barbizon performed the cutting function in-house at its Provo facility. After closing the Provo facility, Barbizon employed a contract cutter, Better Cutting, to perform the cutting function. Barbizon shipped fabric to Provo for cutting and production until its closure, after which Barbizon shipped fabrics to a contract cutter, who then shipped the cut fabric to contractors for production.

The changes to the way Barbizon supplied materials after it closed its Provo facility are described in its answer to Interrogatory No. 7.

Interrogatory No. 10

10. State the reasons why you decided to close the Provo factory and identify all documents which discuss the reasons for, or the possibility of, closing the factory.

Response to Interrogatory No. 10

Barbizon objects to Interrogatory No. 10 because the reasons why it closed the Provo facility have no relevance to the fact of its closure and for the reasons stated in the Introduction. Despite its objection to the interrogatory, Barbizon answers as follows.

Barbizon closed its Provo facility for economic reasons, including high labor costs, excessive turnover and training costs, excessive transportation costs due to the location of the Provo factory, and lack of a West Coast market. See the documents served herewith and labeled "Interrogatory 17."

Interrogatory No. 11

11. State whether the possibility that Congress would pass MPPAA was ever taken into consideration or discussed in connection with the decision to close the Provo factory, and, if so, identify all communications or discussions in which the effect or possible effect of MPPAA was discussed. Your answer should include, without limitation, the identity of all persons who engaged in any such communication or discussion, the identity of all documents which reflect or constitute any such communication or discussion, and the identity of any decision made or actions taken as a result of any such communication or discussion.

Response to Interrogatory No. 11

Barbizon objects to Interrogatory No. 11 because it seeks no information relevant to the subject matter of this case and for the reasons stated in the Introduction. Despite its objection, Barbizon answers as follows.

Barbizon never considered or discussed the possibility that Congress would pass MPPAA in connection with the decision to close its Provo facility.

Interrogatory No. 12

12. Identify all union contractors employed by you for the manufacture of clothing (a) during the two years preceding the closure of the Provo factory, and (b) during the period following the closure of the Provo factory until your withdrawal from the Fund.

Response to Interrogatory No. 12

Barbizon objects to answering Interrogatory No. 12 because the identity of union contractors employed by Barbizon has no relevance to any issue to be decided in this case and for the reasons stated in the Introduction. Nevertheless, Barbizon answers as follows.

The ILGWU Health and Welfare Fund audited Barbizon's books and identified union contractors during fiscal years February, 1979 - January, 1980; February, 1980 - January, 1981; and February, 1981 - January, 1982; February, 1982 - August, 1982 and September, 1982 - January 1983. The audit and other pertinent records for the year February, 1978 - January, 1979 are unavailable. The available audits are served herewith and labeled "ILGWU

Audits". All issues concerning Barbizon's contributions to the Fund were finally concluded in a stipulation and order for discontinuance or for entry of judgment in Case No. 83 Civ. 8052 (EW), previously before this Court, a copy of which is served herewith.

Interrogatory No. 13

13. With respect to each contractor identified in response to the preceding interrogatory, state (a) whether you made contributions to the Fund on behalf of that contractor's employees, and, if so, the amount of those contributions, and (b) the dollar amount of invoices submitted by each such contractor during each relevant period.

Response to Interrogatory No. 13

Barbizon objects to Interrogatory 13(b) because the dollar amount of the invoices in question have no relevance to any issue to be decided in this case, and for the reasons cited in the Introduction. Nevertheless, Barbizon answers as follows.

See audits and stipulation mentioned in response to Interrogatory No. 12 which are served herewith and accordingly labeled.

Interrogatory No. 14

14. Identify all nonunion contractors employed by you for the manufacture of clothing (a) during the two years preceding the closure of the Provo factory, and (b) during the period following the closure of the Provo factory until your withdrawal from the Fund. Your answer should

state, with respect to each such contractor, whether the contractor was located inside or outside of the United States.

Response to Interrogatory No. 14

Barbizon objects to Interrogatory No. 14 because the identity and location of its nonunion contractors has no relevance to any issue to be decided in this case and for the reasons stated in the introduction. Nevertheless, Barbizon answers as follows.

The ILGWU Health and Welfare Fund audited Barbizon's books and identified non-union contractors during fiscal years February, 1979 - January, 1980; February, 1980 - January, 1981; and February, 1981 - January, 1982; February, 1982 - August, 1982 and September, 1982 - January 1983. The audit and other pertinent records for the year February, 1978 - January 1979 are unavailable. See the documents served herewith and labeled "ILGWU Audits." Not included in the audits are "offshore," foreign contractors. All issues concerning Barbizon's contributions to the Fund were finally concluded in a stipulation and order for discontinuance or for entry of judgment in Case No. 83 Civ 8052 (EW) previously before this Court, a copy of which is served herewith.

Interrogatory No. 15

15. With respect to each contractor identified in response to the preceding interrogatory, state the dollar amount of invoices submitted during each relevant period.

Response to Interrogatory No. 15

Barbizon objects to Interrogatory No. 15 because the dollar amount of the said invoices have no relevance to any issue in this case and for the reasons stated in the Introduction. Nevertheless, Barbizon answers by referring defendants to the documents mentioned in its answer to Interrogatory No. 12, copies of which are served herewith and accordingly labeled.

Interrogatory No. 16

16. State each and every fact and identify each and every document upon which you rely in support of the allegation in paragraph 24 of your complaint that "Barbizon's Provo, Utah establishment is a separate facility within the meaning of ERISA §4301, 290 U.S.C. §1397, as amended by MPPAA and DEFRA."

Response to Interrogatory No. 16

Because this interrogatory is premature under local rule No. 46, plaintiff objects to answering this interrogatory at this time and plaintiff reserves the right to use, identify and produce additional evidence during the course of this litigation. However, in the interim, Barbizon answers as follows.

See Complaint ¶¶18-24, Request for Admission of Facts and Documents, ¶¶1-3; Plaintiff's Exhibits B, D, E, G-L, and N heretofore accordingly identified and served on defendants; Plaintiff's Second Request to Defendants for Admissions of Facts and Documents ¶¶1 and 2.

The Barbizon Corporation and Barbizon of Utah, Inc., are distinct corporations. The Barbizon Corporation main-

tains, and maintained during all relevant times, Barbizon of Utah, Inc., as a wholly owned subsidiary, i.e., a separate economic unit of The Barbizon Corporation. Except for a small retail outlet, Barbizon of Utah, Inc.'s only asset consisted of the Provo facility, which it sold by a deed of trust in 1980. These facts are public knowledge. Also, see documents served herewith and labeled "Interrogatory 17."

Interrogatory No. 17

17. State each and every fact and identify each and every document upon which you rely in support of the allegation in paragraph 21 of your Complaint "Barbizon maintained a separate supplemental agreement with the International Ladies Garment Workers Union ("ILGWU") for Barbizon's Provo, Utah ILGWU represented employees."

Response to Interrogatory No. 17

See Complaint ¶¶18-24, Request for Admission of Facts and Documents ¶3.h, i, k-p, Plaintiff's Exhibits H, I, L and N heretofore accordingly identified and served on defendants; Plaintiff's Second Request to Defendants for Admissions of Facts and Documents. Also, see documents served herewith and labeled "Interrogatory 17."

Because this interrogatory is premature under Local Rule No. 46, plaintiff objects to answering this interrogatory at this time and plaintiff reserves the right to use, identify and produce additional evidence during the course of this litigation.

Interrogatory No. 18

18. State each and every fact and identify each and every document upon which you rely in support of the allegations in paragraphs 10 and 11 of your reply to counterclaim that the court lacks subject matter jurisdiction and that the "jurisdictional prerequisites prescribed by ERISA" to the fund's counterclaim have not been satisfied.

Response to Interrogatory No. 18

Complaint ¶¶1-7 and the exhibits cited therein heretofore accordingly identified and served upon defendants.

Because this interrogatory is premature under Local Rule No. 46, plaintiff objects to answering this interrogatory at this time and plaintiff reserves the right to use, identify and produce additional evidence during the course of this litigation.

Interrogatory No. 19

19. State each and every fact and identify each and every document upon which you rely in support of the allegation in paragraph 12 of your reply to counterclaim that the counterclaim is not yet ripe for declaratory judgment.

Response to Interrogatory No. 19

Complaint ¶¶1-7 and the exhibits cited therein heretofore accordingly identified and served upon defendants.

Because this interrogatory is premature under Local Rule No. 46, plaintiff objects to answering this interrogatory at this time and plaintiff reserves the right to use, identify and produce additional evidence during the course of this litigation.

Interrogatory No. 20

20. State each and every fact and identify each and every document upon which you rely in support of the allegation in paragraph 14 of your reply to counterclaim that "[t]he conditions precedent for the counterclaim and its jurisdictional prerequisites have not been fulfilled."

Response to Interrogatory No. 20

Complaint ¶¶1-7 and the exhibits cited therein heretofore accordingly identified and served upon defendants.

Because this interrogatory is premature under Local Rule No. 46, plaintiff objects to answering this interrogatory at this time and plaintiff reserves the right to use, identify and produce additional evidence during the course of this litigation.

Interrogatory No. 21

21. State what disposition was made of the physical assets of the Provo factory.

Response to Interrogatory No. 21

Barbizon answers as follows:

Barbizon disposed of the physical assets of its Provo facility as follows. The land and building were sold. The furniture and office equipment were sold. A majority of the machinery was sold. Some of the specially designed equipment was kept, including certain tucking machines, automatic machines, and also some of the zig-zag machines and narrow gauge lingerie safety stitch machines. Of the specially designed machines which Barbizon kept, some were later sold or loaned to various contractors.

Interrogatory No. 22

22. State the name, address and professional or business affiliation of each expert whom you intend to call as a witness at trial, and, with respect to each such person, state:

Response to Interrogatory No. 22

Barbizon will serve its answer to this interrogatory at the appropriate time. Barbizon objects to answering this interrogatory at this time because it is premature under Local Rule No. 46.

Interrogatory No. 23

23. Identify all persons who provided information in the preparation of your answers to these interrogatories, together with an identification of the interrogatories with respect to which each such person provided information.

Response to Interrogatory No. 23

Barbizon objects to this interrogatory to the extent that it asks for the irrelevant information mentioned in Barbizon's response to Interrogatory Nos. 1-9 and 14-15. Otherwise, Barbizon answers as follows:

The following persons provided information in the preparation of the answers to the indicated interrogatories:

Joseph Massey, Nos. 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 21

Anthony Ritter, Nos. 1, 5, 6, 7, 10, 11, and 21

Marvin Winston, Nos. 2, 4, 5, 12, 13, 14, and 15

REQUESTS FOR PRODUCTION OF DOCUMENTS

Request No. 1

1. All documents identified in your responses to the interrogatories.

Response to Request No. 1

To the extent this request seeks documents respecting irrelevant information sought by interrogatory Nos. 1-9 and 14-15, Barbizon objects by incorporating herein by reference its objections in the Introduction and in its responses to interrogatories 1-9 and 14-15; otherwise, documents responsive to this request are served herewith.

Request No. 2

2. All documents which discuss any changes in your operations identified in response to interrogatories 6, 7, and 9.

Response to Request No. 2

The documents sought by this request are irrelevant for the reasons set forth in Barbizon's response to interrogatories 6, 7, and 9 and Barbizon, therefore, objects to this request for documents by incorporating herein by reference its objections in the Introduction and in its responses to interrogatories 6, 7 and 9; otherwise, documents responsive to this request are served herewith.

Request No. 3

3. All contracts between you and any outside contractors you employed to manufacture clothing during the two years preceding and the two years succeeding the closure of the Provo factory.

Response to Request No. 3

Contracts between Barbizon and outside contractors have no relevance to any issue to be decided in this case, except as to Barbizon's obligation, if any, to contribute to the Fund. Barbizon conducted and conducts its relationships with its contractors on the basis of oral agreements, except for briefly in 1979 when it began and discontinued use of a "form" written contract. A copy of the only available written contract between Barbizon and one of its contractors is served herewith among the documents labeled "Miscellaneous Responsive Documents."

Respectfully Submitted

Wimberly, Lawson & Cobb
By: /s/ James W. Wimberly, Jr.
James W. Wimberly, Jr.
By: /s/ David F. Addleton
David F. Addleton
Attorneys for Barbizon

Suite 1750, Lenox Towers
3400 Peachtree Rd., N.E.
Atlanta, Georgia 30326
(404) 365-0900

Summit, Rovins, & Feldesman
445 Park Avenue
New York, New York 10022
(212) 702-2200

051586:2

STATE OF NEW JERSEY
COUNTY OF MORRIS

AFFIDAVIT

I, Joseph Massey, being duly sworn state the following under oath:

I am Vice President/Manufacturing for the Barbizon Corporation ("Barbizon"), and I am authorized to make the foregoing answers to defendant and counterclaim plaintiffs' interrogatories on behalf of Barbizon.

Each of such answers is either true of my personal knowledge or was obtained from company records or personnel having knowledge of the facts, and I verily believe it to be true.

.....
Joseph Massey

Sworn to and subscribed before me
this ..... day of May, 1986.

.....
Notary Public

ILGWU AUDITS

ILGWU

June 27, 1983

Ms. Beverly A. Pegnato, Controller
The Barbizon Corp.
Stile Lane
Pinebrook, N.J. 07058

Dear Ms. Pegnato:

Enclosed are the following statements of Welfare Funds and Liquidated Damages Due, based on our last audit of Barbizon Corp. for the period September 1, 1982 to January 31, 1983.

Welfare Funds Due (Union Contractors)	$114,683.50
Liquidated Damage Due (Non Union Contractors)	158.05
	$114,841.55

If you have any questions please do not hesitate to call me.

Very truly yours,

/s/ Eduardo Agra
Eduardo Agra

EA:mjs

Enclosure

cc: Wilbur Daniels
Joseph Good

THE BARBIZON CORP.

AUDIT PERIOD: September 1982 - January 1983

STATEMENT OF WELFARE FUNDS DUE ON UNION CONTRACTORS

	PERIOD	CHARGEABLE	RATE	FUNDS DUE
Cullman Industries	9/82-12/82	$ 59,616.75	(A)6.50%	$ 3,875.09
" "	1/83	2,996.86	(A)6.50%	194.80
Dorfman & Hoffman	9/82-12/82	411,499.95	11.90625%	48,994.21
" "	1/83	61,589.09	11.90625%	7,332.95
J.D.V. Mfg.	9/82-12/82	106,389.09	11.90625%	12,666.95
" "	1/83	11,159.02	11.90625%	1,328.62
Somerset Mfg.	9/82-12/82	30,502.30	11.90625%	3,631.68
Stanley Mfg.	9/82-12/82	11,660.70	11.90625%	1,388.35
S.L.C.	10/82	17,529.38	11.90625%	2,087.09
T.H.M.	9/82-12/82	278,654.15	11.90625%	33,177.25
"	1/83	54.67	11.90625%	6.51
				$114,683.50

(A) Per Southeast Region Contractor pays Health Service plan direct to Southeast Region and has his own retirement plan

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THE BARBIZON CORP.

AUDIT PERIOD: September 1982 - January 1983

STATEMENT OF LIQUIDATED DAMAGES DUE ON NON UNION CONTRACTORS

	PERIOD	GROSS CHARGEABLE	RATE	FUNDS DUE
P.B. Apparel Inc.	Jan. 83	$ 790.25	20%	$ 158.05

New York Office: 475 Fifth Avenue New York 10017
Cable Address: Corpobarb New York
Telephone: Area Code 201-575-7290

THE BARBIZON CORPORATION—STILES LANE
PINE BROOK, NEW JERSEY 07058

December 13, 1982

Mr. Eduardo Agra
ILGWU
Welfare Fund Control
218 West 40th St.
New York, N. Y. 10018

Dear Mr. Agra:

Enclosed you will find our payment of $86,293.17 for Welfare funds due per the audit period February 1982-August 1982.

This is partial payment for Dorfman & Hoffman, J. D. V. Mfg., Somerset Mfg. and Cullman Industries.

Better Cutting pays their own welfare and, therefore, has not been included.

We have referred the charge for liquidating damages to our legal counsel.

Thank you.

Very truly yours,

/s/ Beverly A. Pegnato
Beverly A. Pegnato
Controller

BP/ea
cc: Mr. T. Foley

THE BARBIZON CORP.

Audit Period: February 1982 - August 1982

STATEMENT OF WELFARE FUNDS DUE ON UNION CONTRACTORS

	Period	Chargeable	Rate	Funds Due
Dorfman & Hoffman	2/82-6/82	$861,252.31	11.53125%	$ 99,313.16
" "	7/82-8/82	246,634.95	11.90625%	29,364.97
J.D.V. Mfg.	2/82-6/82	132,603.52	11.53125%	15,290.84
" "	7/82-8/82	41,857.40	11.90625%	4,983.64
Somerset Mfg.	4/82-6/82	49,663.58	11.53125%	5,726.83
" "	7/82-8/82	22,212.21	11.90625%	2,644.64
Better Cutting	6/82	60,000.00	11.53125%	6,918.75
" "	7/82-8/82	88,000.00	11.90625%	10,477.50
Cullman Industries	11/81-1/82(A)	50,334.38	6.50% (B)	3,271.73
" "	2/82-8/82	184,469.59	6.50% (B)	11,990.52
				$189,982.58

(A) Prior Audit

(B) Per Southeast Region
Contractor pays Health Services plan direct to Southeast Region and has his own retirement plan.

THE BARBIZON CORP.

Audit Period: February 1982 - August 1982

STATEMENT OF LIQUIDATED DAMAGES DUE ON NON UNION CONTRACTORS

Contractor	Period	Gross Chargeable	Rate	Funds Due
Charles Henry Co.	2/82	$ 44,780.46	20%	$ 8,956.09
Asia Perez	2/82-7/82	58,162.63	20%	11,632.52
Zaida Fashions Inc.	2/82	947.00	20%	189.40
				$ 20,778.01

ILGWU

May 25, 1982

Mr. Stanley Rosenthal, Controller
The Barbizon Corp.
Stile Lane
Pinebrook, N.J. 07058

Dear Mr. Rosenthal:

Enclosed are the following statements of Welfare Funds and Liquidated Damages due, based on our last audit for the period February 1, 1981 to January 31, 1982 of Barbizon Corp.

Welfare Funds Due (Union Contractors)	$271,771.65
Liquidated Damages Due (Non Union Contractors)	190,356.22
	$462,127.87

If you have any question please do not hesitate to call me.

Yours truly,

/s/ Donald Fischer
Donald Fischer
Director

DF:sa
opeiu 153
Encl.

THE BARBIZON CORP.

Audit Period: February 1981 - January 1982

STATEMENT OF WELFARE FUNDS DUE ON UNION CONTRACTORS

Contractors	Period	Gross Chargeable	Reported	Diff.	Rates	Funds Due
Donna Dee Co.	2/81-3/81	$ 11,931.03	–	$ 11,931.03	10.3125%	$ 1,230.39
Dorfman & Hoffman	2/81-6/81	683,112.30	–	683,112.30	10.3125%	70,445.96
Dorfman & Hoffman	7/81-1/82	825,348.18	–	825,348.18	11.53125%	95,172.96
J.D.V. Mfg.	1/82	23,543.23	–	23,543.23	11.53125%	2,714.83
Sayre Lingerie	2/81-6/81	380,471.39	–	380,471.39	10.3125%	39,236.11
Sayre Lingerie	7/81-1/82	445,749.48	–	445,749.48	11.53125%	51,400.49
Somerset	11/81	10,096.37	–	10,096.37	10.3125%	1,041.19
Better Cutting	1/82	90,000.00	–	90,000.00	11.53125%	10,378.13
Zerilli-Mancuso Dress	4/81	1,470.00	–	1,470.00	10.3125%	151.59
				Total Funds Due		$271,771.65

THE BARBIZON CORP.

Audit Period: February 1981 - January 1982

STATEMENT OF LIQUIDATED DAMAGES DUE ON NON UNION CONTRACTORS

Contractors Name	Period	Gross Chargeable	Rate	Funds Due
A.J. Schneierson & Son	5/81-6/81	$ 37,395.86	20.%	$ 7,479.17
Charles Henry Co.	4/81-1/82	659,224.84	20.%	131,844.97
Kellwood Co.	4/81-5/81	27,487.70	20.%	5,497.54
Kirby Mfg. Co. Inc.	8/81-10/81	18,232.34	20.%	3,646.47
Millcrest Mfg. Co.	8/81-11/81	24,668.47	20.%	4,933.69
P.B. Apparel	12/81-1/82	11,808.12	20.%	2,361.62
Asia Perez	2/81-1/82	165,076.79	20.%	33,015.36
Zaida Fashions	12/81-1/82	7,887.00	20.%	1,577.40
				$190,356.22

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THE BARBIZON CORP.

Audit Period: February 1980 - January 1981

STATEMENT OF WELFARE FUNDS DUE

Contractors Name	Period	Gross Chargeable	Rate	Funds Due
Dorfman & Hoffman	2/80-1/81	$459,435.90	10.3125%	$ 47,379.33
Sayre Lingerie Inc.	6/80-1/81	299,288.65	10.3125%	30,864.14
The Tony Dee Corp.	2/80-12/80	453,756.85	10.3125%	46,793.68
Donna Dee Inc.	2/80-1/81	7,258.96	10.3125%	748.58
J.D.V. Manufacturing Co.	2/80-1/81	19,610.76	10.3125%	2,022.36
West Orange Mfg. Co. Inc.	6/80-1/81	215,140.44	10.3125%	22,186.36
				$149,994.45

THE BARBIZON CORP.
Audit Period: February 1979 - January 1980

May 2, 1980

STATEMENT OF WELFARE FUNDS DUE

Payroll	Period	Gross Chargeable	Net Reported		Diff.	Rate	Funds Due
Provo, Utah	W.E.3/31/79	$ 43,093.51	$ 42,848.86		$ 244.65	7.25%	$ 17.74
" "	Jan. '79			(A)	651.16	7.25%	47.21
Contractors							
Dorfman & Hoffman	1/1-6/30/79	198,104.05	134,634.64		63,469.41	13.21875%	8,389.86
" "	7/1-7/26/79	47,816.48	32,397.90		15,418.58	13.40625%	2,067.05
" "	8/1-12/31/79	417,885.68	–		417,885.68	13.40625%	56,022.80
" "	1/1-1/31/80	12,775.97	–		12,775.97	13.96875%	1,784.64
" "	1/29-6/28/79			(B)	142,316.30	.46875%	667.10
" "	7/2-7/5/79			(C)	9,903.83	.65625%	64.99
The Toni Corp.	1/1-1/31/80	40,436.07	–		40,436.07	14.3475%	5,801.57
					Total Welfare Funds Due		$ 74,862.96

(A) Emp. # 497 Karen Goldston
Not reported in January 1979,
reported the rest of the year.

(B) Paid at 12.75% Should be 13.21875%

(C) Paid at 12.75% Should be 13.40625%

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ILGWU

February 4, 1982

Mr. Stanley Rosenthal, Controller
The Barbizon Corp.
475 Fifth Avenue
New York, N.Y. 10015

Dear Mr. Rosenthal:

Enclosed is a revised statement of Health and Welfare Funds and Liquidated Damages due showing $11,591.66 to be due based on our last two audits for the period February 1979 to January 1981 of Barbizon Corp.

I will appreciate if you send us a check for that amount as soon as possible. I am still waiting for your answer to my letter in reference to Barbizon Corp. responsibility for the payments to the Health and Welfare Funds on behalf of J.D.V. Mfg. Co.

If you have any question do not hesitate in calling me.

Very truly yours,

/s/ Eduardo Agra
Eduardo Agra
Assistant Director

THE BARBIZON CORP.

Audit Period: February 1979 - January 1981

REVISED STATEMENT OF WELFARE FUNDS AND LIQUIDATED DAMAGES DUE

	Period	Gross Chargeable	Reported	Diff.	Rate	Funds Due
Provo Payroll	W.E. 3/31/79	$ 43,093.51	$ 42,848.86	$ 244.65	7.25%	$ 17.74
Provo Payroll	Jan. 79			(A) 651.16	7.25%	47.21
Contractors						
Donna Dee Inc.	2/80-1/81	7,258.96		7,258.96	10.3125%	748.58
Liquidated Damages						
Asia Perez	10/80-1/81	53,890.63		53,890.63	20.00%	10,778.13
						$ 11,591.66

(A) Emp. No. 497 Karen Goldstein not reported on January 1979, reported the rest of the year.

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APPENDIX DD

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85-Civ-8822 (EW)

THE BARBIZON CORPORATION,
Plaintiff,

v.

ILGWU NATIONAL RETIREMENT FUND,
SOL C. CHAIKIN and JOSEPH MOORE,
Defendants.

DEFENDANTS' SUPPLEMENTAL RESPONSES TO PLAINTIFF'S SECOND SET OF INTERROGATORIES

Defendants and Counterclaim Plaintiffs, ILGWU National Retirement Fund (the "Fund"), Sol C. Chaikin and Joseph Moore ("Defendants") hereby supplement their prior Responses to Plaintiff's Second Set of Interrogatories.

Interrogatory No. 24

State the amount of contributions, in dollars, that the Fund contends Barbizon was obligated to pay to the Fund because of:

A. Barbizon's covered operations in Provo, Utah.

B. Barbizon's covered operations in Montville, N.J.

C. Contracts between Barbizon and subcontractors, identifying each subcontractor and the amount of contributions, in dollars, attributable to each subcontractor.

Supplementary Response to Interrogatory No. 24

For each of the years 1975-1982,[1] the Fund contends that Barbizon was obligated to make contributions to the Fund in the following amounts and with respect to the following Barbizon-related operations:

1975	Provo Operations		$ 78,177.76
	Contractor Operations		–0–
		Total	$ 78,177.76
1976	Provo Operations		$ 102,951.26
	Contractor Operations		–0–
		Total	$ 102,951.26
1977	Provo Operations		$ 123,667.16
	Charlet Corp.		1,114.05
	Dorfman & Hoffman		2,356.46
		Total	$ 127,137.67
1978	Provo Operations		$ 148,008.25
	Charlet Corp.		70.45
	Dorfman & Hoffman		54,195.34
		Total	$ 202,274.04
1979	Provo Operations		$ 140,884.71
	Dorfman & Hoffman		36,366.29
	The Toni Dee Corp.		10,761.25
		Total	$ 188,012.25
1980	Provo Operations		$ 36,520.98
	Dorfman & Hoffman		23,258.94
	The Toni Dee Corp.		22,971.44
	Donna Dee, Inc.		367.48

1. Data shown are for fiscal years commencing February 1 of the year indicated.

	JDV Mfg., Inc.		992.79
	Sayre Lingerie		15,151.49
	West Orange Mfg. Co.		10,891.48
		Total	$ 110,154.60
1981	Provo Operations		$ –0–
	Dorfman & Hoffman		81,879.22
	Donna Dee, Inc.		604.01
	JDV Mfg., Inc.		27,928.82
	Somerset Mfg. Co.		511.13
	Zerilli-Mancuso Dress		74.42
		Total	$ 110,997.60
1982	Provo Operations		$ –0–
	Dorfman & Hoffman		97,557.54
	JDV Mfg. Co.		18,118.31
	Stanley Mfg.		743.37
	Somerset		6,340.36
		Total	$ 122,759.58
1983	Provo Operations		$ –0–
	Dorfman & Hoffman		40,264.56
	Stanley Mfg.		803.68
		Total	$ 41,068.24
1984	Provo Operations		$ –0–
	Contractor Operations		–0–
1985	Provo Operations		$ –0–
	Contractor Operations		–0–

The Fund has been unable to access complete contribution records covering Barbizon's Montville, N.J. operations. When these records are available, the Defendants will further supplement their response.

Interrogatory No. 25

State the amount of contributions, in dollars, that the Fund contends Barbizon actually paid to the Fund because of:

A. Barbizon's covered operations in Provo, Utah.

B. Barbizon's covered operations in Montville, N.J.

C. Contracts between Barbizon and subcontractors, identifying each subcontractor and the amount of contributions, in dollars, attributable to each subcontractor.

Supplementary Response to Interrogatory No. 25

In each of the years 1975-1982,[2] the Fund contends that Barbizon made contributions to the Fund in the following amounts:

1975	$ 89,947.94
1976	$106,228.41
1977	$127,070.21
1978	$195,866.15
1979	$171,422.50
1980	$ 70,250.75
1981	$ 31,067.32
1982	$144,066.92
1983	$ 14,529.58
1984	$124,966.46
1985	$ –0–

2. Fund contribution records are on a cash receipts basis, and the data set forth is presented in that fashion. Thus, amounts shown as received in one year may well relate to work done, and obligations arising, in a preceding year.

Fund contribution records do not distinguish between particular Barbizon operations, and the data set forth above is therefore in aggregate form.

Signed as to Defendants

Bert N. Obrentz
Arnold & Porter
By /s/ K. Peter Schmidt
K. Peter Schmidt
Philip W. Horton
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

Booth, Marcus & Pierce
By /s/ Marc E. Richards
A Member of the Firm
74 Fifth Avenue
New York, New York 10003
(212) 620-0300

DATED: July 25, 1986

APPENDIX EE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85-Civ-8822 (EW)

THE BARBIZON CORPORATION,
Plaintiff,

v.

ILGWU NATIONAL RETIREMENT FUND, SOL C. CHAIKIN and JOSEPH MOORE,
Defendants.

DEFENDANTS' SECOND SUPPLEMENTAL RESPONSE TO PLAINTIFF'S SECOND SET OF INTERROGATORIES

Defendants and counterclaim-plaintiffs ILGWU National Retirement Fund (the "Fund"), Sol C. Chaikin and Joseph Moore hereby supplement their prior response to interrogatory no. 24 of Plaintiff's Second Set of Interrogatories.

INTERROGATORY NO. 24

State the amount of contributions, in dollars, that the Fund contends Barbizon was obligated to pay to the Fund because of:

A. Barbizon's covered operations in Provo, Utah.

B. Barbizon's covered operations in Montville, N.J.

C. Contracts between Barbizon and subcontractors, identifying each subcontractor and the amount of contributions, in dollars, attributable to each subcontract.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 24

The Fund does not maintain records of the information sought by Interrogatory No. 24 with respect to the Montville plant for the years prior to the fiscal year commencing February 1, 1980. With respect to the period after February 1, 1980, the information sought is as follows:

1980	$15,867.57
1981	$18,909.09
1982	$24,696.69

/s/ Bert N. Obrentz
Bert N. Obrentz
Arnold & Porter
By /s/ Philip W. Horton
K. Peter Schmidt
Philip W. Horton
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

Booth, Marcus & Pierce
By /s/ Marc E. Richards
A Member of the Firm
74 Fifth Avenue
New York, New York 10003
(212) 620-0300

DATED: August 4, 1986

APPENDIX FF

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION
NO. 84-4163

CENTRAL PENNSYLVANIA TEAMSTERS
PENSION FUND, et al,

vs.

ROYAL SWAN FOODS, INC.

CIVIL JUDGMENT

Before HUYETT, J.

AND NOW, this 19th day of September, 1985, in accordance with the order dated September 19, 1985.

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the defendant and against the plaintiffs.

By The Court:

/s/ (Illegible)

ATTEST:

Francis E. DeVine
Deputy Clerk

(Filed September 24, 1985)

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION
NO. 84-4163

CENTRAL PENNSYLVANIA TEAMSTERS
PENSION FUND, et al.

v.

ROYAL SWAN FOODS, INC.

MEMORANDUM AND ORDER

HUYETT, J. September 19, 1985

The instant case has been submitted to me as "a case stated" on a stipulated factual record.[1] The parties have reduced the case to a single issue of law. For the reasons set forth below, defendant's position is the correct one and judgment will be entered in its favor.

1. Defendant has moved to strike certain portions of plaintiffs' brief. The basis of this motion is that plaintiffs' brief contains factual material which is not covered in the stipulation entered into by the parties which should not be considered by the court. Plaintiffs contend that this material is not in dispute and that it is appropriate for the court to consider it. Although I will not formally grant defendant's motion, I believe that the position taken by defendant is the correct one. If plaintiffs had wished to rely on this factual material, it either should have been included in the stipulation or this case should have been resolved through motions for summary judgment with supporting affidavits. I will therefore not consider any factual material which is not included in the stipulation.

Background

This is a case arising under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1132, 1145, and 1451. Plaintiffs are the Central Pennsylvania Teamsters Pension Fund ("the Fund") and various individuals. The defendant is a company that apparently was engaged in the food distribution business. The parties have stipulated that it is an employer within the meaning of ERISA. Defendant operated a food distribution center in Berwick, Pennsylvania until September, 1979. The activities of this center involved almost exclusively the shipment of food to stores of more than 100 independent retail businesses in Pennsylvania and New Jersey. The food supplied was sold on a cost-plus-a-fee-for-service basis. The Berwick center also housed a number of services used to support its operations. The covered employees at the Berwick center were involved solely in the process of distributing food to the purchasing businesses. Defendant permanently closed the Berwick center in September, 1979 and all operations there ceased. Defendant has since rented the building in Berwick to Bordens, Inc.

In addition to the Berwick center, defendant operated a "cash-and-carry" operation in Hazleton, Pennsylvania. This center was primarly engaged in the sale to retailers and other purchasers and the distribution of food to convenience stores owned by defendant's subsidiaries. The Hazleton operation was housed in a building that was much smaller than the former Berwick center. Before the Berwick center closed, it supplied food to the Hazleton center. After Berwick closed, Hazleton began purchasing foods from other suppliers. After the Berwick center closed only one piece of equipment and only two former Berwick employees were transferred to Hazleton although

the collective bargaining agreement in force allowed transfer between the centers without permission of the Fund or the Union. The twenty-nine other employees at Berwick were terminated.

Defendant is a signatory to a collective bargaining agreement with Local 401 of the International Brotherhood of Teamsters. Pursuant to this agreement, defendant made contributions to the Fund on behalf of covered employees. On or about April 1, 1983, defendant effected a complete withdrawal from the Fund as defined under ERISA.

Discussion

The sole issue presented to me is whether the Berwick Center constituted a "facility" within the meaning of 29 U.S.C. § 1397(a). If Berwick was a facility, then contributions properly allocable to work performed there should not have been taken into account when defendant's withdrawal liability was calculated. If, on the other hand, Berwick was not a separate facility, then such contributions were properly taken into account.

The starting point for an analysis of this issue is § 4217(a) of ERISA, as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MEPPA"), 29 U.S.C. § 1397(a). That section provides that:

> (a) For the purpose of determining the amount of unfunded vested benefits allocable to an employer for a partial or complete withdrawal from a plan which occurs after September 15, 1980, and for the purpose of determining whether there has been a partial withdrawal after such date, the amount of contributions, and the number of contribution base units, of such employer properly allocable—

(1) to work performed under a collective bargaining agreement for which there was a permanent cessation of the obligation to contribute before September 26, 1980, or

(2) to work performed at a facility at which all covered operations permanently ceased before September 26, 1980, or for which there was a permanent cessation of the obligation to contribute before that date,

shall not be taken into account.

Because Berwick closed before September 26, 1980, defendant claims that § 1397(a)(2) relieves it of any obligation regarding the contributions allocable to work performed there.

Unfortunately the term "facility" is nowhere defined in ERISA. The legislative history does not add much either. In the House report on MEPPA, a facility is "defined" as "an economic unit, generally at a single location, where business is conducted or industrial operations are performed." H.R. Rep. 869, Part II, 96th Cong., 2d Sess. at 18 (1980). The Report also noted that a definition of "facility" could be included in the plan itself. In the instant case, the plan does not define facility.

At the outset, the Fund argues that any determination made by the Fund administrators is presumed under the statute to be correct and that defendant must prove that the Fund's determination that Berwick and Hazleton constituted a single facility was clearly erroneous or unreasonable. *See* 29 U.S.C. § 1401(3)(A). If the question before me were simply one of the amount of the withdrawal liability, I would agree that the determination of

the Fund is entitled to such deference. The question before me, however, is one of statutory construction which is beyond the competence of a plan administrator or arbitrator. *See United Paperworkers International Union Local 35 Pension Plan v. Arlington Sample Book Co.*, No. 83-2828 (E.D. Pa., May 23, 1984) (decision regarding what party was an "employer" within the meaning of the act was one for a court and not for an arbitrator). Arbitrators (and by analogy Plan administrators) are not authorized to construe statutes. *Meatcutters Local 88 Pension Plan v. Delmonte Supermarkets*, 4 E.B.C. 2039, 2041 (E.D. Mo.), *vacated on joint motion of the parties*, 4 E.B.C. 2168 (8th Cir. 1983). It is the function of this court to determine what the intent of Congress was in enacting § 1397. Thus I must review the facts of this case and the available law in order to determine whether Berwick was a separate facility within the meaning of the Act.

Both parties seem to favor an approach which looks to the economic reality of the situation rather than some set formula. The Fund, however, favors an approach which looks first to the collective bargaining history of the parties and then to the nature of the business conducted.

Section 1397 by its terms would seem to place a limit on the importance that the collective bargaining relationship of the parties may have to the question before me. Section 1397(a) includes two subsections which are set in the alternative. In measuring the partial withdrawal liability of an employer, the Plan may consider work performed under an entire collective bargaining agreement pursuant to which there was a permanent cessation of the obligation to contribute, § 1397(a)(1), or may consider work performed at a facility, § 1397(a)(2). Thus,

by its terms, this section precludes the argument advanced by the Fund that a facility in this case equates with all operations covered under the collective bargaining agreement. Moreover, I note that the stipulation of facts is virtually silent on the terms of the collective bargaining agreement between Local 401 and the defendant.

Congress intended a "facility" to be conterminous with "an economic unit" of the employer's business. *See* H.R. Rep. 869 Part II, 96th Cong., 2d Sess. at 18 (1980). This definition requires that the primary focus be on the employer's business and the relationship of the "facility" in question to that business. The facts of this case reveal that the Berwick center operated in such a substantially different and independent manner from the Hazleton center that it would be stretching the intent of Congress to label the two part of the same facility.

There are several aspects of the stipulated factual record which mandate this conclusion. First, Berwick and Hazleton appear to have been engaged in completely different types of operations. Berwick was involved in the distribution of food to retailers on a cost-plus basis whereas Hazleton was involved in a cash and carry operation. The fact that the two locations were involved in demonstrably different types of operations is further supported by a comparison of the two physical plants. Berwick was a very substantial plant. Hazleton, on the other hand, was a much smaller facility.

The Fund's approach to this question focuses too heavily on the way in which the union and the employer treated Berwick in terms of the general scheme of collective bargaining. This approach ignores the fact that an employer may treat its plants in one manner for the purposes of collective bargaining and in another manner

for the purposes of its own business. Section 1397(a)(2), and the gloss given to the definition of "facility" in the House Report, focuses not on the manner in which the employer and union conceive of the enterprise for the purposes of collective bargaining, but rather on the manner in which the business is organized and operated *as a business.*

The meager authority in this area supports my conclusion. In Opinion Letter 82-33 (Oct. 28, 1982), the Pension Benefit Guaranty Corporation opined that in the context of a retail food store chain, a "facility" normally would mean a single store, barring some evidence that the employer shifted operations from one store to another.[2] Although this opinion letter does not carry the weight of law, it is entitled to some deference as the opinion of the agency charged, in large measure, with the implementation of ERISA.

Similarly, in *DelMonte Supermarkets,* the court held that each store within a chain of markets was a separate facility within the meaning of § 1397(a). *DelMonte* presented an even stronger argument that the all operations tions involved were a single facility than does the present case because, unlike here, the nature of the business operations conducted at one retail food store did not differ markedly from that of another retail food store. In the present case, the parties have stipulated that the business conducted at Berwick and Hazleton was significantly different.

The Fund relies on two reported arbitrator's decisions in support of its position. As I have stated above,

---

2. There was no significant shift of the Berwick operation to Hazleton after the former location closed in 1979. Only two employees of the former twenty-nine were transferred and only a single truck was transferred.

the question presented in this case is one which is beyond the competence of an arbitrator. Assuming, however, that the cases relied upon by the Fund do merit weight, I do not find that they warrant a conclusion that Berwick and Hazleton are a single facility.

The Fund cites *Walt's Super Markets, Inc. and Indiana Area Food and Commercial Pension Plan*, 4 E.B.C. 1494 (1983). That case is, however, facially distinct from the present case because the parties therein had defined the term facility in the plan as "all store locations covered by a single collective bargaining agreement." The plan in this case has no such definition and *Walt's Super Markets* therefore does not aid in the analysis of the present case.

Similarly, in *Buy-Low of Cassopolis, Inc. and Board of Trustees, Food Workers Pension Fund*, 5 E.B.C. 2641 (1984), the arbitrator determined that the parties to the plan had established the practice of treating all stores under a single agreement as a "facility." For the reasons stated above, I have already concluded that the approach used by the *Buy-Low* arbitrator conflicts with the intent of § 1397, and I therefore refuse to accept that reasoning here. If Congress had intended that a facility should be all those operations covered under a collective bargaining agreement or all those operations traditionally treated as a single unit for bargaining purposes, there would have been little, if any, need to draft sections 1397(a)(1) and (2) separately.

For the foregoing reasons, I have concluded that the Berwick Center is a single facility within the meaning of § 1397(a)(2). I will therefore dismiss the complaint with prejudice. An appropriate order follows.

/s/ Daniel H. Huyett
Daniel H. Huyett, 3rd, Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION
NO. 84-4163

CENTRAL PENNSYLVANIA TEAMSTERS
PENSION FUND, et al.

v.

ROYAL SWAN FOODS, INC.

ORDER

NOW, September 19, 1985, upon consideration of the stipulated record, the memoranda of the parties, and for the reasons set forth in the accompanying memorandum, IT IS ORDERED that plaintiffs' complaint is DISMISSED WITH PREJUDICE. Judgment is entered in favor of defendant and against plaintiffs.

/s/ Daniel H. Huyett
Daniel H. Huyett, 3rd, Judge

APPENDIX GG

82-33
§4217

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W., Washington, D.C. 20006

OCT 28 1982

This responds to your request for a written opinion from the Pension Benefit Guaranty Corporation (the "PBGC") regarding the meaning of the term "facility" as used in Section 4217 of the Employee Retirement Income Security Act of 1974 ("ERISA"), *as amended by* the Multiemployer Act.

Section 4217 of ERISA provides, in pertinent part, as follows:

> (a) For the purpose of determining the amount of unfunded vested benefits allocable to an employer for a partial or complete withdrawal from a plan which occurs after April 28, 1980, and for the purpose of determining whether there has been a partial withdrawal after such date, the amount of contributions, and the number of contribution base units, of such employer properly allocable—
>
> > (2) to work performed at a facility at which all covered operations permanently ceased before April 29, 1980, or for which there was a permanent cessation of the obligation to contribute before that date,
>
> shall not be taken into account. [29 U.S.C. §1397 (a)(2).]

You have outlined an example in which a national food store chain maintained retail food stores in a particular metropolitan area, closed of these stores prior to April 29, 1980, and closed the remaining stores in 1982. You have requested our opinion how employer contributions to a multiemployer pension plan, allocable to work performed at the stores which closed prior to April 29, 1980, would be treated under Section 4217.

Under the Multiemployer Act the initial responsibility for determining whether any particular action constitutes a withdrawal from a multiemployer plan, and the amount of any liability resulting therefrom, lies with the plan sponsor. The Act further provides that any disputes between a plan sponsor and an employer on these issues are to be resolved first through arbitration and then, if necessary, in the courts. Given this scheme for enforcement of the Act, it would be inappropriate for the PBGC to interject itself in such a determination by issuing an opinion on the application of the law to particular transactions. The PBGC, however, will continue its practice of answering general interpretive questions regarding the Act.

The question whether Section 4217 of ERISA applies to the closing of a single store, or only to the closing of a group of stores in a defined geographical area, is such a general interpretive question. It is our opinion that the term "facility" in Section 4217 of ERISA, in the context of the retail food industry, ordinarily means a single store. Thus, a single retail food store which is permanently closed ordinarily would be "a facility at which all covered operations permanently ceased," within the meaning of Section 4217(a)(2) of ERISA, regardless of whether all of the

retail food stores operated by a national chain in a given city were closed. However, they may be circumstances in which the plan sponsor may determine that a shift of operations from one location to another constitutes a continuation of operations at a facility. A dispute over such a determination would, as mentioned above, be subject to arbitration.

This general interpretation of the term "'facility" is consistent with an explanation in the legislative history of the meaning of the term for purposes of the partial withdrawal rule. In its report on a bill (H.R. 3904) which eventually became the Multiemployer Act, the Ways and Means Committee of the House of Representatives stated that "[f]or purposes of partial withdrawal rules . . . the term means an economic unit, generally at a single physical location, where business is conducted or industrial operations are performed." H.R. Rep. No. 869, Part II, 96th Cong., 2d Sess. 18 (1980), *reprinted in* [1980] U.S. Code Cong. and Ad. News 3007.

I hope this information is of assistance to you. If you have any further questions, please telephone
of this office on (202) 254-4895, or write to him at the above address.

Sincerely,

/s/ Henry Rose
Henry Rose
General Counsel

APPENDIX HH

86-2
§4217
29 USC 1461 note
(§4402 of ERISA)

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W., Washington, D.C. 20006-1806

JAN 31 1986

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation regarding the meaning of the term "facility" as used in section 4217 of the Employee Retirement Income Security Act, as amended (ERISA), and whether a multiemployer pension plan has authority to adopt its own definition of that term. ERISA contains no definition of "facility".

In the situation you describe, a national food chain (the "Company") operated over 50 retail food stores in the , area prior to the enactment of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). All but two of these stores were closed before September 26, 1980, the date of enactment of MPPAA. Your specific question is whether these stores constituted "facilities" within the meaning of section 4217 of ERISA.

You represent that each store was located at a discrete geographical location and was operated as a separate profit center and managed by a separate store manager. Each store was self-contained, meaning that it carried a full complement of food and related items typically found in a full-line supermarket.

You further represent that certain of the Company's employees at these stores were represented by local unions of the International Association, now known as the Union (the "Union") under three collective bargaining agreements. The Company made contributions to the Union and Food Employers Pension Plan of (the "Plan") in a lump sum representing the total amount due from the Company to the Plan during the relevant period. The plan document defines the term "facility" as "all store locations covered by a single collective bargaining agreement."

Section 4217 of ERISA provides, in pertinent part, as follows:

> (a) For the purpose of determining the amount of unfunded vested benefits allocable to an employer for a partial or complete withdrawal from a plan which occurs after September 25, 1980, and for the purpose of determining whether there has been a partial withdrawal after such date, the amount of contributions, and the number of contribution base units, of such employer properly allocable—
>
> . . .
>
> (2) to work performed at a facility at which all covered operations permanently ceased before September 25, 1980, or for which there was a permanent cessation of the obligation to contribute before that date,
>
> shall not be taken into account. [29 U.S.C. §1397 (a)(2).]

In Opinion Letter 82-33 (October 28, 1983), the PBGC reviewed the question of whether section 4217 of

ERISA applies to the closing of a single retail food store or only to the closing of a group of stores in a defined geographical area. The General Counsel concluded that the term "facility" in section 4217 of ERISA, in the context of the retail food industry, ordinarily means a single store. We hereby affirm that opinion. This interpretation is based on generally accepted economic terminology under which "facility" means a discrete economic unit of an employer. It is also consistent with the long-standing definition of the term "establishment" used in the Standard Industrial Classification Manual. Finally, as noted in Opinion Letter 82-33, this interpretation is consistent with the definition of "facility" that Congress considered promulgating with respect to the partial withdrawal rules. (*See* H.R. Rep. No. 869, Part II, 96th Cong., 2nd Sess. 18 (1980).) As you have noted, this definition and the accompanying explanatory text were dropped from the final version of MPPAA. This Congressional expression of the meaning of the term "facility" is therefore not dispositive of the issue. It was referenced in Opinion Letter 82-33 merely to demonstrate that the interpretation set forth in that letter was in accord with the commonly used meaning of "facility".

Opinion Letter 82-33 did not expressly address a plan's authority to adopt its own definition of the term "facility". It is our opinion that Congress did not grant plans the authority to adopt their own definitions of "facility." In earlier versions of MPPAA, Congress permitted (or required) plans to define "facility." Since the bill that was ultimately enacted did not contain such a provision, we conclude that Congress decided against allowing plans to adopt their own definitions of "facility." This conclusion is supported by the fact that in other sections of ERISA,

e.g., section 4219(c)(5)(B), Congress did expressly give plans the authority to provide their own definitions of specified terms.

We recognize, of course, that there are many undefined terms in ERISA and that in the absence of PBGC interpretations of those terms, plans might need to construct their own definitions in order to implement the law. This is permissible provided those definitions are reasonable. However, once the PBGC has issued its interpretation of a statutory term (as we did with respect to "facility" on October 28, 1982) plans are precluded from adopting their own definitions unless that power is specifically conferred by ERISA or by the PBGC. Moreover, where plans adopt definitions of statutory terms in contradiction to the PBGC's interpretations, the PBGC, in appropriate cases, will seek to intervene or file an *amicus* brief in a court proceeding to uphold its interpretation.

I hope this has been of assistance. If you have further questions please contact the attorney handling this matter, Steven Rothenberg, of the Corporate Policy and Regulations Department. His telephone number is (202) 956-5050.

Very truly yours,

Edward R. Mackiewicz
General Counsel

APPENDIX II

82-22

Pension Benefit Guaranty Corporation
August 3, 1982

ERISA Section:
4205(b)
4212(c)
4219
4221

This responds to your request for our opinion concerning the application of the partial withdrawal rule contained in Section 4205(b)(2)(A)(ii) of ERISA. Specifically you request clarification of the meaning of the term 'facility'; i.e., 'whether the term refers to a discrete geographic location or whether it has a broader application.' We conclude that the term ordinarily refers to a discrete geographic location for purposes of this rule. Section 4205(b) provides in relevant part:

(b) For purposes of subsection (a)—

* * *

(2)(A) There is a partial cessation of the employer's contribution obligation for the plan year if, during such year—

(ii) an employer permanently ceases to have an obligation to contribute under the plan with respect to work performed at one or more but fewer than all of its facilities, but continues to perform work at the facility of the type for which the obligation to contribute ceased. (Emphasis added.)

Thus, the statute is clear that work of the same type must continue at the same facility for which contributions were previously required. It is our view that this ordinarily refers to a facility which continues operations at a discrete location. However, there may be circumstances under which the plan sponsor will determine that a shift of operations from one location to another constitutes a continuation of operations at the facility. See also Section 4212(c) of ERISA. If the plan sponsor makes such a determination, and if the employer objects, the matter must then be resolved through the dispute resolution procedures described in Sections 4219 and 4221 of ERISA.

I hope this is of assistance to you.

Sincerely,

Henry Rose
General Counsel

APPENDIX JJ

85-32

Pension Benefit Guaranty Corporation
December 31, 1985

ERISA Section:
4204

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation ('PBGC') on the application of the relief provisions of Section 4204 of the Employee Retirement Income Security Act, as amended ('the Act'). Specifically, you ask whether an employer that has withdrawn from a multiemployer pension plan may be relieved of withdrawal liability by a subsequent sale of assets in accordance with Section 4204.

In the situation you describe, an employer that was obligated to contribute to a multiemployer plan ceased contributions upon contracting out the work on which the contributions to the plan were based ('the covered operations'). The required contributions were then made by the contractor. At a subsequent date, the contractor agreed to purchase the covered operations.

Section 4201 of the Act provides that an employer may be liable to a multiemployer plan upon a complete or partial withdrawal from the plan. A complete withdrawal is defined under Section 4203 as occurring when an employer either 1) permanently ceases to have an obligation to contribute under the plan or 2) permanently ceases all covered operations under the plan. Section 4204 establishes a limited exception to this definition of withdrawal so that the transfer of ownership of a business

by a sale of assets can be effected without withdrawal liability being incurred by the seller. Thus, subject to certain conditions, Section 4204 provides that a withdrawal will not occur 'solely because, as a result of a bona fide, arm's-length sale of assets to an unrelated party . . . the seller ceases covered operations or ceases to have an obligation to contribute for such operations.'

When an employer withdraws from a plan before a sale of assets, it is our opinion that Section 4204 cannot be used to prevent the assessment of withdrawal liability. For Section 4204 to apply, the employer's withdrawal must be as a result of the sale of assets and not the product of an earlier event. This letter does not express any opinion as to whether, in the circumstances that you describe, the employer's obligation to contribute to the plan permanently ceased before the sale of its assets. The determination of when a withdrawal has occurred and whether Section 4204 may be applied is to be made by the plan sponsor in a given case, subject to arbitration and review in the courts.

I hope this has been of assistance. If you have further questions please contact the attorney handling this matter, * * * of the Corporate Policy and Regulations Department. His telephone number is (202) 956-5050.

Very truly yours,

Edward R. Mackiewicz
General Counsel

APPENDIX KK

Warren WEIL and Maria Galuppo, Plaintiffs,

v.

RETIREMENT PLAN ADMINISTRATIVE COMMITTEE OF the TERSON COMPANY, INC., Terson Company, Inc. and Northern Trust Company as Trustees of The Terson Company, Inc. Salaried Retirement PLAN, and Rollins Burdick Hunter of New York, Inc., Defendants.

No. 82 CIV. 8468 (JEL).

United States District Court, S.D. New York.

June 15, 1988.

Eagle & Fein, P.C., Rachel J. Minter, New York City, for plaintiffs.

Richard W. Cutler, New York City, LOGAN T. JOHNSTON III, Winston & Strawn, Phoenix, Ariz., for defendants.

OPINION

J. EDWARD LUMBARD, Circuit Judge: (FN*)

Plaintiffs, Warren Weil and Maria Galuppo, are former employees of Ward Foods, Inc. They contend that the Ward Retirement Plan for Salaried Employees (the "plan") was "partially terminated" within the meaning of 26 U.S.C. s 411(d)(3) when The Terson Company acquired Ward and took over operations of the plan in 1981 and approximately 132 New York area plan partic-

ipants (including plaintiffs) were terminated from employment. As a result of this alleged partial termination, plaintiffs claim that they are entitled to receive benefits accrued at the time the partial termination occurred. See Retirement Plan for Salaried Employees of Ward Foods, Inc., Article XIV, s 3; Treas.Reg. s 1.411(d)-2(a)(1). Defendants respond that no partial termination occurred in 1981, and that, even if one did, the plaintiffs are prevented from recovering any benefits because the plan was "underfunded" at the time the alleged partial termination occurred.

The court concludes that a partial termination of the plan occurred in 1981 and that a further hearing is necessary to determine whether the plan was underfunded.

Until its acquisition by Terson in 1981, Ward was a diversified food conglomerate which owned, inter alia, numerous bakeries, seafood operations, and a candy division. Due to financial difficulties in the 1970's, Ward sold off or closed a number of its less profitable divisions. This reorganization plan resulted in the termination from employment between the years 1977-80 of a large number of employees who were plan participants.

On December 31, 1980, Terson acquired Ward. As part of its reorganization strategy, Terson relocated the candy division and the corporate headquarters to Milwaukee and Chicago, respectively. Primarily as a result of this move, 132 Terson employees who were plan participants in the New York area, including Weil and Galuppo, lost their jobs.

Weil and Galuppo had each served less than ten years, consequently, when they were terminated, their

right to pension benefits under the terms of the plan had not yet vested. They received only a refund equal to the amount they had contributed to the plan, plus interest.

On December 20, 1982, Weil and Galuppo commenced this action claiming, inter alia, that they are entitled to receive accrued retirement benefits because a partial termination of the plan occurred in 1981. Under ERISA, all benefits accrued at the time of a partial termination become nonforfeitable, to the extent they are funded. Treas.Reg. s 1.411(d)-2(a).

On January 5, 1984, Judge MacMahon granted Terson's motion for summary judgment. Weil v. Retirement Plan Admin. Comm. for The Terson Co., 577 F.Supp. 781 (S.D.N.Y.1984). He noted that Article 1(26) of the plan defines partial termination by referring to Section 411 of the Internal Revenue Code. The applicable IRC regulation provides:

Whether or not a partial termination . . . occurs shall be determined . . . with regard to all the facts and circumstances in a particular case. Such facts and circumstances include: the exclusion, by reason of plan amendment or severance by employer, of a group of employees who have previously been covered by the plan. . . .

Treas.Reg. s 1.411(d)-2(b). Judge MacMahon held that although 27% of the plan participants were terminated in 1981, "no other facts or circumstances warrante(d)" the conclusion that a partial termination had occurred. 577 F.Supp. at 783.

On appeal, the Court of Appeals adopted the position of the Internal Revenue Service that "dismissal of a 'sig-

nificant number of employees' in connection with a major corporate event constitutes a partial termination." Weil v. Retirement Plan Admin. Comm. for The Terson Co., 750 F.2d 10, 12 (2dCir.1984) (emphasis in original). The court concluded that "a partial termination of the Ward's Plan may have occurred," and that the record before the district court was inadequate to allow a grant of summary judgment. Id. at 13. In remanding the case for further proceedings, the court suggested that Terson might demonstrate that a substantial number of the plan participants terminated in 1981 left their employment voluntarily or were dismissed for another reason. Such proof would militate against a finding of partial termination. The court noted that the record was unclear "whether employee terminations in 1980 may have been related to Terson's acquisition of Ward in 1981." If so, the 1980 terminations should also be taken into account. Lastly, the court pointed out that plaintiffs "are entitled to vesting of otherwise forfeitable benefits upon partial termination only to the extent that the benefits were funded as of the date of such termination. If they are to prevail, (plaintiffs) must demonstrate funding of the benefits they seek." 750 F.2d at 13.

A bench trial on the partial termination issue took place on November 4 and 5 and the court finds as follows:

Although Judge MacMahon and the Court of Appeals referred to 27% of plan participants having been terminated, it appears from revised data submitted by Terson to the Internal Revenue Service in 1983 that of the 386 employees participating in the plan in 1981, 132, or 33.4%, were terminated. Only 65 plan participants, or 16.4% of all employees participating in the plan in 1981, were terminated without vested benefits.

Plaintiffs urge us to accept the larger figures calculated by Martin Zoberman, Terson's Vice President and Treasurer. As pointed out at trial, Zoberman was merely trying to be helpful when he summarized the data he was asked to supply and he specifically stated that he did not warrant the accuracy of his figures. Hector Mislavsky, Terson's actuary, explained at trial that Zoberman made several erroneous assumptions in his calculations. Consequently, the court declines to accord any weight to Zoberman's calculations.

The testimony at trial indicated that most of the employees terminated from the plan in 1981 left Terson's employ because of the reorganization/relocation of various divisions and the corporate headquarters. It is not clear from the record whether employees who left before their offices officially closed received severance pay; however, testimony at trial confirmed that employees who stayed until the end were paid severance pay which was not normally paid to those who left their jobs voluntarily. Given that most of the divisions at which those terminated were employed were closed or moved, the court thinks it is a fair inference that these employees did not "voluntarily" leave their jobs even if they found other employment before their division actually closed. They really had little choice.

With respect to the suggestion of the Court of Appeals that the 1980 terminations might be related to the Terson acquisition and subsequent terminations in 1981, there is nothing in the record to suggest that was the case. The evidence is to the contrary. The co-chairman of Terson, Joe Masterson, was a former member of Ward Foods upper management. He left in 1979 essentially

because his view regarding the business strategy Ward should follow differed substantially from the rest of Ward's management. Masterson and his partner bought out Ward effective December 31, 1980 and instituted their own reorganization plans.

The Court of Appeals has held that, "dismissal of a 'significant number of employees' in connection with a major corporate event constitutes a partial termination." 750 F.2d at 12 (emphasis in original). There is little question that the relocation and closing of several divisions after a leveraged buyout qualifies as a major corporate event. Thus, what must be determined is whether a "significant number" of plan participants were terminated in 1981. It is somewhat unclear which of the two figures offered is dispositive—the 33.4% of plan participants terminated, which includes those with vested benefits, or the 16.4% non-vested terminated. Obviously, the plaintiffs emphasized the former, and defendants the latter.

The Treasury Department publishes Plan Termination Standards to assist IRS agents in determining when a partial termination has occurred. The Standards state that "There is no fixed percentage of employees nor any fixed number of employees that we may set as guidelines. The facts and circumstances in each case must be considered." The Standards go on to note that a 20% reduction in "employees covered by the plan" would not by itself constitute a partial termination. However, coupled with additional factors like a plant closing, a reversion of assets to the employer as a result of termination of the plan or prohibited discrimination, 20% might be enough. Thus, the language in the Standards suggests that the total number of covered employees terminated, regardless of their

vesting status, should be considered in figuring the percentage.

However, a 1981 letter from the IRS to Ward indicates otherwise. Ward Foods applied to the IRS in 1980 for a determination on whether a partial termination of the plan had occurred in the years 1975-1980. The IRS analyzed each year separately setting forth the relevant percentages for each year. Only the non-vested terminations were considered. The IRS concluded that no partial termination had occurred noting that the highest percentage in a single year was 15% (1980) and that this number "did not approach" percentages deemed significant in earlier revenue rulings.

As the defendants point out, a partial termination in this case actually affects only those participants whose benefits had not yet vested. Thus, it seems logical only to consider the non-vested participants in determining whether a partial termination occurred. This argument, however, was made on appeal and the Court of Appeals appears to have concluded that both vested and non-vested plan participants who were terminated must be considered in determining whether there has been a partial termination. Similarly, other courts which have considered the matter and the IRS have followed what appears to be the prevailing approach to the partial termination issue and have drawn no distinction between vested and non-vested terminations. See Tipton & Kalmbach, Inc. v. Commissioner, 83 T.C. 154 (1984); Wishner v. St. Luke's Hospital Center, 550 F.Supp. 1016 (N.D.N.Y.1984); Ehm v. Phillips Petroleum Co., 583 F.Supp. 1113 (D.Kan.1984); see Rev.Rul. 81-27, 1981-1 C.B. 228; Rev.Rul. 73-284, 1973-2 C.B. 139; Rev.Rul. 72-439, 1972-2 C.B. 223.

The court finds that a partial termination of the plan took place in 1981 when 33.4% of the plan participants were terminated in connection with Terson's acquisition and reorganization of Ward Foods. The court will hear evidence on the finding of the plan at the earliest convenience of the parties.

This opinion constitutes the findings of fact and conclusions of law required by Fed.R.Civ.P. 52.

APPENDIX LL

HOW A UNION TRIED TO SAVE A GARMENT PLANT

To the Editor:

On Nov. 6 The Times carried an Associated Press story headlined "3 Women Fight Their Own Union to Save 320 Jobs." I would like to present several additional facts which should shed a somewhat different light on the actions of the International Ladies' Garment Workers' Union.

• When our union learned that the Provo, Utah, Barbizon plant would close, we were distressed because the members of Local 430 would be unemployed with no opportunity for comparable work. Barbizon was the only unionized garment plant in the vicinity. Local 430 members' wages averaged 25 to 50 percent above those of their non-union counterparts. When benefits were counted, the differential increased substantially.

• The I.L.G.W.U. actively sought other employers to utilize the Barbizon facility. They advised us that the Provo plant was not economically viable.

• Since there appeared to be no means of continuing operations, a negotiating committee from Local 430 and the top officers of the I.L.G.W.U. bargained for severance pay. The settlement included about $250,000 in severance and $85,000 in vacation benefits. The members of Local 430 quoted in the A.P. story were involved in these negotiations and were satisfied with their results.

• After the plant had closed, Professor Warner Woodworth of Brigham Young University encouraged some of the members of Local 430 to establish a worker-owned garment firm which would provide jobs at union

scale. The I.L.G.W.U. gave this concept very serious consideration.

● Mitchell Lokiec, the director of our union's engineering department, was sent to Provo to conduct a feasibility study. He is an industrial engineer with 30-plus years' experience in the garment industry.

● Lokiec concluded that the ingredients for a successful worker-owned venture were absent. The Barbizon plant had been dismantled, the experienced management was gone and, most importantly, there was no market for the products of a worker-owned garment plant. He estimated minimal start-up costs for a sewing plant employing 320 workers at $1,148,712.

● Lokiec's findings confirmed the sentiments of the experienced firms which we attempted to interest in utilizing the Barbizon plant. At best, a worker-owned garment plant could bid for work formerly done by non-union firms in the area. This, however, would require meeting non-union compensation rates, defeating the purpose of worker ownership in this case.

● In August, I met with Professor Woodworth and discussed the economic problems associated with his proposal. He indicated that he agreed with Lokiec's findings. In a letter dated Sept. 2, Professor Woodworth stated that he "hoped to meet with the leadership of the local . . . to help them appreciate the complexities of any kind of worker-owned venture in this industry."

In light of these facts, it was clear that the appropriation of $10,000 for an additional feasibility study was unwarranted.

Sol C. Chaikin
President, I.L.G.W.U.
New York, Nov. 12, 1980

APPENDIX MM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85-Civ-8822 (EW)

THE BARBIZON CORPORATION,
Plaintiff and
Counterclaim Defendant,
v.
ILGWU NATIONAL RETIREMENT FUND, SOL C. CHAIKIN and JOSEPH MOORE,
Defendants and
Counterclaim Plaintiffs.

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants and counterclaim plaintiffs ILGWU National Retirement Fund, Sol C. Chaikin and Joseph Moore (collectively referred to as the "Fund") submit this reply to Barbizon's memorandum filed in response to the Fund's motion for summary judgment (the "Response").

Much of Barbizon's Response rehashes arguments which Barbizon has previously made and to which the Fund has previously responded. The Fund will not repeat those responses here. Most of the remainder of the Response is devoted to Barbizon's assertions that

(1) relief under section 4217 does not necessarily require a decrease in its business—a proposition, contrary to Barbizon's claims, that is not disputed by the Fund; and (2) the closure of the Provo plant constituted a permanent cessation of Barbizon's obligation to contribute under a collective bargaining agreement within the meaning of section 4217(a)(1).

Barbizon's arguments on these issues suffer from a fundamental misconception about the distinction under MPPAA, critical to application of the statute, between work for which an employer makes contributions to a multiemployer plan ("contributory operations") and work for which it does not ("noncontributory operations"). This distinction, as well as the most egregious Barbizon misstatements of the law and the Fund's position, are responded to below.

ARGUMENT

I. SECTION 4217 DOES NOT APPLY BECAUSE BARBIZON'S SHIFT OF OPERATIONS DID NOT INVOLVE EITHER A SWITCH FROM CONTRIBUTORY TO NONCONTRIBUTORY OPERATIONS OR A REDUCTION IN CONTRIBUTORY OPERATIONS.

Part I of Barbizon's Response (pp. 4-13), discusses at great length the fact that a withdrawal or partial withdrawal can occur under the statute without a reduction in an employer's business. For example, a "complete" withdrawal may occur when an employer ceases to have an obligation to contribute to a plan—as when it goes nonunion—even though the employer's level of operations does not decrease. Similarly, under section 4205(b)(2)(A), 29 U.S.C. § 1385(b)(2)(A), a "partial" withdrawal may occur, even if the employer's business

does not decrease, if the employer substitutes noncontributory operations for contributory operations.[1] By analogy Barbizon argues that section 4217 should apply to closure of the Provo plant, even though such closure did not result in a proportionate reduction in its business.

Barbizon is correct in asserting that MPPAA's treatment of partial withdrawals should guide the Court's interpretation of section 4217. The problem with Barbizon's argument, however, is that it fails to distinguish between contributory and noncontributory operations.

The crux of the matter is as follows. MPPAA imposes withdrawal liability on post-MPPAA cessations of, or reductions in, *contributory* operations. Liability is imposed whether previously contributory operations become noncontributory (*e.g.*, the employer goes nonunion) or actually cease (*e.g.*, the employer closes its operations or its operations decline so much that a partial withdrawal results). Thus, although a withdrawal does not necessarily require a cessation or reduction in an employer's overall operations, it does require a cessation or defined reduction in its contributory operations.

Similarly, section 4217 does not impose liability with respect to *pre-MPPAA* cessations of, or reductions in, *contributory* operations. As under section 4205, this is true whether contributory operations became noncontributory (because the employer's obligation to contribute

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1. This can occur in either of two ways: (1) an employer who has more than one collective bargaining agreement creating an obligation to contribute ceases to have an obligation under fewer than all of those agreements but continues the work thereunder (or transfers such work to another jurisdiction), or (2) an employer with multiple facilities ceases to have an obligation to contribute with respect to fewer than all its facilities but continues to perform the same work at those facilities.

under a collective bargaining agreement expired) or simply ceased to exist (because a facility closed).

What Barbizon fails to note is that its previously contributory operations neither ceased nor became non-contributory. Instead, these operations continued on a contributory basis, albeit at different locations than Provo. In such situations, section 4217 simply has no applicability.

The distinction discussed above is graphically illustrated in the Fund's August 1982 letter responding to Barbizon's inquiries about potential withdrawal liability. (Barbizon Exhibit 13.) Paragraph B.2.b. of that letter states the following: "[s]hould Barbizon transfer work of a type for which it was previously required to make contributions to the Fund, *without continuing to make such contributions,* then a partial withdrawal may also occur." (Emphasis added.) Although Barbizon purports to rely on this letter, it conspicuously fails to discuss this language. The point is that a partial withdrawal may occur without a decline in business only if the employer shifts to noncontributory operations. Barbizon, however, simply substituted another form of contributory operations by shifting its operations to union contractors. Such a substitution does not create a partial withdrawal under section 4205 and would not, if occurring pre-MPPAA, satisfy the conditions of section 4217.

In addition to ignoring the distinction between contributory and noncontributory operations, Part I of the Response is rife with misstatements. First, in its effort to find comfort in the partial withdrawal rules, Barbizon alleges over and over again that the Fund's August 1982 letter, mentioned above, described the closure of the Provo plant as a partial withdrawal. (Response at 4, 7

and 12.) This contention is simply not true, and is in fact somewhat mystifying. Nothing in the Fund's letter even remotely suggests that the closure of the Provo plant constituted a partial withdrawal, and continually repeating the allegation will not make it true.[2]

* * *

CONCLUSION

This Court should deny Barbizon's motion for summary judgment and grant the Fund's motion for summary judgment.

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2. Barbizon also asserts that "the Fund would require Barbizon to leave the garment industry entirely" in order to make section 4217 applicable. (Response at 13.) The Fund has no idea how Barbizon conceived its contorted characterization of the Fund's position. As noted earlier, the Fund concedes that a switch from contributory to noncontributory operations, all within the industry, would clearly have entitled Barbizon to a 4217 adjustment had it occurred.

Supreme Court, U.S.
FILED
NOV 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-572

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

THE BARBIZON CORPORATION,
Petitioner,
v.

ILGWU NATIONAL RETIREMENT FUND,
SOL C. CHAIKIN and JOSEPH MOORE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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16 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the district court and the court of appeals properly held that petitioner The Barbizon Corporation ("Barbizon") does not qualify for a reduction in its withdrawal liability to respondent ILGWU National Retirement Fund (the "Fund") * under section 4217(a)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1397(a)(2), as a result of the closure of Barbizon's factory in Provo, Utah?

2. Whether the district court and the court of appeals properly held that Barbizon does not qualify for a reduction in its withdrawal liability to the Fund under ERISA section 4217(a)(1), 29 U.S.C. § 1397(a)(1), as a result of the closure of Barbizon's Provo factory?

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* Respondents Chaikin and Moore were trustees of the Fund when this action was filed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-572

THE BARBIZON CORPORATION,
Petitioner,

v.

ILGWU NATIONAL RETIREMENT FUND,
SOL C. CHAIKIN and JOSEPH MOORE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

Respondents object to Barbizon's statement of the case and refer this Court to the "Background" statements in the opinions of the court of appeals and the district court, which appear at pages A2-A6 and A15-A17 of the Appendix.

Respondents particularly object to the assertion in Barbizon's statement of the case that when Barbizon closed its Provo plant it transferred its work to nonunion contractors. The record actually establishes that Barbizon shifted the bulk of the Provo work to union contrac-

tors, where *it continued* to have an obligation to make (and did in fact make) contributions with respect to such work. Barbizon's distorted factual assertions, which are unsupported by the record, together with its significant factual omissions (principally the fact of its ongoing contribution obligation regarding the work in question) underlie Barbizon's specious claim that the decision of Judge Weinfield and the unanimous decision of the Second Circuit panel will somehow prevent multiemployer plans from collecting withdrawal liability when employers shift from union to nonunion labor.

REASONS FOR DENYING THE WRIT

I. BARBIZON CANNOT IDENTIFY ANY ISSUES THAT MERIT REVIEW BY THIS COURT.

Perhaps the most striking aspect of the petition is Barbizon's failure to identify any issues of sufficient import to justify the involvement of this Court. All prior MPPAA cases reviewed by the Court have involved fundamental issues of broad scope, *e.g.*, the Constitutionality of withdrawal liability generally, of its retroactive application, or of the statutory presumption of correctness afforded plan determinations. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986); *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717 (1984); *Pension Benefit Guaranty Corp.* v. *Yahn & McDonnell, Inc.*, —— U.S. ——, 107 S. Ct. 2171 (1987). Each of these cases presented broad challenges to the statutory scheme for withdrawal liability, and had fundamental implications for thousands of employers.

This case, by contrast, is virtually *sui generis*. ERISA section 4217(a)(2), 29 U.S.C. § 1397(a)(2), applies only to employers who closed a facility prior to September 26, 1980 (the effective date of MPPAA), but did not withdraw until after that date. The decisions below can af-

fect only a minuscule fraction of this already-small group.

Under those decisions, Barbizon's pre-MPPAA shift of contributory work from unionized, common-law employees to outside union contractors, contractors for whose employees Barbizon continued to have a contribution obligation and to make contributions, does not entitle Barbizon to a reduction in any withdrawal liability it subsequently incurs. Only similarly-situated employers who closed a factory over eight years ago and shifted their work in this manner could be affected.

While Barbizon understandably would prefer not to pay its withdrawal liability, that fact does not expand the scope of this case beyond a very narrow issue affecting, at most, a handful of employers. Nor is there any conflict with any other decision, at either the circuit or district court level. Under these circumstances (and quite apart from the fact that the courts below reached the only appropriate decision), there simply is no reason to involve this Court.

Unable to contend plausibly that the section 4217 issues are sufficiently important to merit review, Barbizon suggests that Judge Weinfeld and the Second Circuit have so badly misunderstood the principles underlying MPPAA that their decisions "will have disastrous results in future cases" not involving that section. (Pet. at 8.) The basis for this apocalyptic claim is that Barbizon allegedly shifted its Provo work to *nonunion* contractors for whom it did not contribute to the Fund.

As Barbizon correctly states, a post-MPPAA shift to nonunion labor may result in either a complete or a partial withdrawal. Similarly, a total, pre-MPPAA shift to nonunion labor as a result of closing the Provo plant would have qualified as a facility closing under Section 4217. Barbizon argues incorrectly that the Fund and

the decisions below fail to recognize the latter proposition, and that this failure will also preclude recognition of the former. (Pet. at 24-27.)

Respondents agree that a pre-MPPAA shift to nonunion labor as a result of a plant closing may entitle an employer to relief under section 4217, just as a post-MPPAA shift to nonunion labor may result in either a complete or a partial withdrawal. Indeed, a shift to nonunion operations is perhaps the clearest case for assessing withdrawal liability. The problem for Barbizon is that when it closed its Provo plant it did not shift to nonunion labor. It shifted to *union* contractors, and retained its contribution obligation on such work.[1] Although the petition tirelessly repeats a contrary claim, the record is bereft of any evidence of a shift to nonunion labor until long after the closing of the Provo plant and the effective date of the statute—a fact of which the Second Circuit was well aware.[2]

Ultimately, Barbizon did change over to a noncontributory (nonunion) production basis, and that changeover triggered Barbizon's withdrawal from the Fund in 1982. As of the effective date of the statute, however,

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[1] Collective bargaining agreements in the ladies garment industry generally require that manufacturers like Barbizon, rather than the contractors they use, make contributions on the work of contractor employees. Thus, after closing Provo, Barbizon continued to contribute on the production of its newly-retained outside contractors.

[2] Barbizon cites pages A285, A288 and A214-18 of its Appendix for the proposition that it shifted its work to nonunion contractors and to its nonunion plant in Puerto Rico. (Pet. at 5-6.) These portions of the record, however, do not show retention of any nonunion contractors before February of 1981—several months after both the closing of the Provo plant and the effective date of MPPAA. Moreover, it is undisputed that Barbizon did not open its Puerto Rico plant until March 1982, nearly two years after it closed its Provo operation. (*See* Barbizon's Response to Defendants' Interrogatory No. 5; A263.)

Barbizon continued to have an obligation and continued to contribute on work previously done at the Provo plant. Thus, the only issue decided in this case was whether the 1980 shift from one form of contributory operation to another qualified Barbizon for relief under section 4217. Barbizon's claim that the decisions below will somehow disrupt the entire statutory scheme is totally without foundation.[3]

II. THE COURTS BELOW PROPERLY HELD THAT THE CLOSING OF BARBIZON'S PROVO PLANT WAS NOT A FACILITY CLOSING WITHIN THE MEANING OF ERISA § 4217(a)(2).

Although Barbizon's failure to identify any issues of significance to other cases is in itself a sufficient reason for denying the petition, denial is also proper since Judge Weinfeld's and the Second Circuit's holdings were entirely correct.

As the court of appeals noted, the 1980 change in its operations did not cause Barbizon to discontinue any product lines, alter any trademarks, modify its marketing procedures, lose any productive capacity, suffer any loss of sales, or incur any material change in the level of its contribution obligation. (A4.) In other words, the closure of the Provo plant reflected neither an end to the business previously associated therewith, nor a cessa-

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[3] Indeed, the Fund administers the statute in exactly the same manner in all situations, both pre- and post-MPPAA. The Fund does not treat as a withdrawal a shift from contributory, in-house production to contributory operations using outside contractors in *either* time setting. This fact is perhaps best illustrated by the Barbizon case itself. At the time Barbizon closed the Provo plant, June of 1980, the effective date for withdrawal liability was April 29, 1980, and yet the Fund never contended that the closing produced a withdrawal. (Congress subsequently amended ERISA to make the effective date for withdrawal liability coterminous with MPPAA's date of enactment, *see R.A. Gray, supra*, which made the Provo plant closing a pre-MPPAA event.)

tion of its obligation to contribute thereon. Instead, it reflected only Barbizon's decision to shift its mode of production to outside contractors.

Since Barbizon cannot dispute the fact that it merely shuffled its contributory operations in 1980, it urges the Court to adopt a simplistic approach under which the facility closing relief granted under section 4217 would turn only on the physical shut-down of a discrete physical location. Under Barbizon's approach, an employer who, prior to MPPAA, closed a plant but shifted its operations lock, stock and barrel into a new building across the street, would, in a subsequent, post-MPPAA withdrawal, avoid all liability based on operations at its old building.

Nothing in MPPAA, its legislative history, the cases decided under section 4217, or the statements of the Pension Benefit Guaranty Corporation ("PBGC") supports such a simplistic approach. The term "facility" is not defined in section 4217 or elsewhere in the statute. The only relevant legislative history—which states that a facility is "an economic unit, *generally* at a single physical location"—demonstrates, however, that Barbizon's narrow definition of the term will not always be appropriate. (*See* Decision of the court of appeals at A9.) Interpreting the legislative history, Judge Weinfeld noted the following:

> Although a facility will often consist of a single physical plant, Congress clearly contemplated exceptions. One such exception would be where a plant merely moved across the street without ceasing business in any way. Another exception would be where an employer closes one plant and opens another because it has adopted a new method of production in order to escape responsibilities to employees. (A21-22.)

A number of opinion letters issued by the PBGC contain similar statements, demonstrating that a mere shift

of production does not constitute the closing of a facility. *See* Opinion Letter Nos. 82-33 (October 28, 1982) (Appendix GG at A310-13), 85-1 (January 4, 1985) and 82-22 (August 3, 1982) (Appendix II at A317-18). As the PBGC stated in Letter No. 82-33:

> It is our opinion that the term "facility" in Section 4217 of ERISA, in the context of the retail food industry, ordinarily means a single store. Thus, a single retail food store which is permanently closed ordinarily would be "a facility at which all covered operations permanently ceased," within the meaning of Section 4217(a)(2) of ERISA, regardless of whether all of the retail food stores operated by a national chain in a given city were closed. *However, there may be circumstances in which the plan sponsor may determine that a shift of operations from one location to another constitutes a continuation of operations at a facility.* (A311-12.) (Emphasis supplied.)

As this Court has recognized, the PBGC's position on the meaning of the statute is entitled to deference. *See Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 373-74 (1980). Both of the decisions below properly relied on these opinion letters in rejecting Barbizon's mechanistic view of section 4217. (A10-11; A22.)

Moreover, as those decisions recited, both judicial and arbitral decisions have recognized that a shift in operations may preclude a facility closing. *See Paperworkers Local 286 Pension Plan and Karden Industries*, 6 Employee Benefits Cas. (BNA) 2398, 2408 (April 8, 1985) (Nagle, Arb.)[4] (rejecting a claim of a facility closing where "the productive operations which had been performed at [the closed plant] . . . did not themselves cease" but were transferred to another location); *May*

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[4] Arbitrator Nagle is the former Executive Director of the PBGC.

Stern & Co. and Western Pennsylvania Teamsters and Employers Pension Fund, 8 Employee Benefits Cas. (BNA) 2205, 2215 (April 16, 1987) (Nagle, Arb.) (company qualified under § 4217 because "[t]here is no suggestion that the covered work performed at a closed facility was simply transferred to another facility"); *Central Pennsylvania Teamsters Pension Fund* v. *Royal Swan Foods*, No. 84-4163, slip op. at 8 (A307) (court held that relief under § 4217 was proper "barring some evidence that the employer shifted operations from one store to another").[5]

These decisions, together with the statements of the PBGC and the legislative history, demonstrate that the decisions below are correct.[6] In view of this wealth of authority, the absence of any authority to the contrary,[7] and the lack of any issues of wide significance, review by this Court is neither necessary nor appropriate.

In a transparent and spurious attempt to increase the emotional content of its petition, Barbizon contends that the courts below erred in failing to grant relief under section 4217 because "there was at least an 80% decline in contributions because of the Provo closure." (Pet. at

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[5] These cases are discussed in the decision of the court of appeals at A9-11 and in the decision of Judge Weinfeld at A22-24.

[6] In addition to the cases discussed above, Judge Weinfeld correctly noted that "[t]he garment industry has a unique history of shifting from direct production to indirect jobber status in order to avoid obligations to employees" and that, in light of this history, it was particularly appropriate to find that Barbizon's shift to the use of contractors "was no more than a continuation of the same business Barbizon had conducted in Provo." (A22, A23.)

[7] Most of the cases cited by Barbizon involved claims by a plan that all of an employer's establishments taken together constituted a single facility so that the closure of a single establishment prior to MPPAA did not constitute a facility closing—a claim which respondents are not making. None of those cases is relevant to an employer that shifted its operations.

18-19.) This manipulation of the stipulated facts is nothing more than sleight of hand, and a fairly clumsy effort at that.[8] Even if there were any merit to Barbizon's calculations, writs of certiorari are not customarily granted to resolve a dispute over a simple, arithmetic calculation.

Barbizon also now argues, for the very first time, that summary judgment was improper due to an allegedly disputed issue of fact regarding the decline in its contributions.[9] (Pet. at 22-24.) This claim is baseless. No material facts are in dispute; the figures regarding Barbizon's contributions all appear at A294-95. The only dispute is whether Barbizon made a mathematical error in

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[8] The relevant figures regarding Barbizon's contributions to the Fund appear at A294-95. Barbizon reached its 80% figure, asserted for the first (and, prior to now, only) time in its reply brief in the court of appeals, by comparing the increase in contributions made on behalf of union contractors between 1979 and 1980 with the drop in contributions for Provo between 1979 and *1981*—simply ignoring $36,000 in contributions made for Provo in 1980. (*See* Pet. at 19 n.3.) When these contributions are included, the decline is approximately 41%. This decline would not result in a partial withdrawal under ERISA section 4205, and thus should not result in a finding that there had been a facility closing. This is especially true since a 41% decline represents nowhere near the reduction that would be expected from simply closing the Provo plant (which had represented 90% of Barbizon's operations).

[9] Judge Weinfeld specifically asked counsel for Barbizon below whether there were any disputed issues of fact:

> THE COURT: I take it both sides agree that the matter is ripe for summary judgment. There are no factual issues.
>
> MR. SCHMIDT: That's our position, Your Honor. I believe that's the position of the plaintiff.
>
> THE COURT: That is the plaintiff's position?
>
> MR. WIMBERLY: Yes, your Honor.

Having agreed below that summary judgment was appropriate, Barbizon should not, having become unhappy with the judgment it sought, be heard to argue the contrary here.

trying to put the best face on those figures. The court of appeals was perfectly capable of resolving that dispute by reviewing the undisputed facts, and there is certainly no reason for this Court to become entangled in those calculations.

III. THE COURTS BELOW PROPERLY HELD THAT BARBIZON WAS NOT ENTITLED TO RELIEF UNDER ERISA § 4217(a)(1).

Barbizon also seeks review of the determination of Judge Weinfeld, affirmed unanimously by the court of appeals, that Barbizon is not entitled to a reduction in its withdrawal liability under ERISA section 4217(a)(1), 29 U.S.C. § 1397(a)(1). Under that section, withdrawal liability calculations are made by disregarding contributions with respect to "work performed under a collective bargaining agreement for which there was a permanent cessation of the obligation to contribute" prior to MPPAA. Barbizon contends that contributions for work done at the Provo plant should be disregarded under this section because it had entered into a supplemental agreement with the International Ladies' Garment Workers' Union governing the closure of that plant. That supplement recognized that Barbizon's obligation to contribute for work done in Provo would expire when the plant closed and no more work was being performed there. (Pet. at 27-30.)

With respect to this claim, Barbizon does not even contend that the issues are sufficiently important to merit review by this Court; it has, as with its other positions, simply inserted as much of its prior argument as possible without exceeding the page limit for its petition. There is no reason for the Court to concern itself with this technical, fact-specific issue, which was fully considered by the courts below.

In any event, the reason that Barbizon is not entitled to relief under this section is easily stated.[10] As the courts below held, section 4217(a)(1) requires a complete cessation of an employer's duty to contribute under a particular collective bargaining agreement. At any given time, Barbizon's duty to contribute was created by a single Master Agreement which covered not only the Provo plant but also all of Barbizon's other operations, including the contractors it hired. Thus, although Barbizon's duty to contribute *at Provo* ended when that plant was closed, its overall duty to contribute never ceased, because it had a single, seamless obligation to contribute under the Master Agreement. In the absence of a permanent cessation of an obligation of Barbizon to contribute, there is no basis for relief under section 4217(a)(1).

[10] A more detailed discussion is contained in the opinions of the court of appeals and the district court at pages A7-8 and A24-25, respectively.

CONCLUSION

For the reasons stated above, the Petition For A Writ of Certiorari should be denied.

Respectfully submitted,

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